No. 622.

Brief of Mallory for Resp

IN THE

Supreme Court of the United States.

Filed April 26, 1898.

OCTOBER TERM, 1897.

JOHN McMULLEN, *Petitioner*,
v.
JULIA E. HOFFMAN, Executrix of the last will of LEE HOFFMAN, deceased, *Respondent*.
No. 622.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

DOLPH, MALLORY & SIMON,
Attorneys for Respondent.

F. W. BALTES & COMPANY, PRINTERS, PORTLAND, OREGON.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN MCMULLEN, *Petitioner*,
v.
JULIA E. HOFFMAN, Executrix of the last will of LEE HOFFMAN, deceased, *Respondent*. } No. 622.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The first question for consideration is whether the petition, as a whole, presents a case of such gravity and importance as to require or justify this court under the rules which govern its action in such cases to bring the record of the Circuit Court of Appeals here for

review. In Law On Ben, Petitioner, 141 U. S. 583-587, it is said "that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and it is only when such questions are involved that the power of this court to require a case in which the judgment or decree of the Court of Appeals is made final, to be certified, can properly be invoked."

The petition and record filed here show the controversy to be between citizens of different states, and this difference of citizenship is the basis of jurisdiction; hence, but for the reservation in the act creating the Circuit Court of Appeals, of the right of this court to issue as writs of *certiorari*, the judgment of that court would have been absolutely final.

The object of the suit is to compel one of the parties to pay money to the other. The simple fact of the payment or non-payment of the money sued for, the general public has no other concern with than that, since application is made to the court, the public is interested in seeing that in its courts justice is administered according to law. Before the courts can determine what law must be the guide by which justice is to be administered, it must be in possession of the facts to which the law is to be applied. The petition in this case, and the record accompanying it, set out a state of facts to which the Court of Appeals applied a rule of law which they regarded as the correct rule of decision under to the facts proved. But the petitioner declares that these findings of the Circuit Court of Appeals are contrary to the evidence; that a different state of facts was actually established by the proof, and that to such facts the court should have applied a different rule of law.

In Columbus Watch Co. v. Robbins, 148 U. S. 266, this court say in effect, at page 270, that the fact that the Circuit Court of Appeals for one circuit has rendered a different judgment from that of another Circuit Court of Appeals for another ***under the same conditions***, might furnish grounds for a *certiorari* on proper appli-

cation. It is further stated that this difference can only exist where the courts have actually reached contradictory results. It goes without saying that these results must be based upon the same conditions, which means the same or similar facts. From the petition in this case, it appears that the facts upon which the Circuit Court of Appeals based its decision were different from those found by the court and it is now sought to have this court bring up the record of the Circuit Court of Appeals, and find, if it can, that that court erred in its findings of fact, and to such facts applied the wrong rule of decision, that this court may correct the error. It seems safe to assume that this court will not issue the writ of certiorari for any such purpose, but will accept the facts as found by the Court of Appeals as the correct statement of the conditions upon which its decision was based.

"This branch of our jurisprudence should be exercised sparingly, and with great caution."—141 U. S., supra.

It is submitted that the case made by the petition, viewed from the standpoint here taken, shows no grounds for the writ of *certiorari*, either from any interest the general public has in the questions presented, or for the purpose of avoiding confusion of decisions in federal courts upon questions showing the same conditions.

But the petition presents another feature, stating, in effect, that if the facts are as found by the court, which the petition denies, the Court of Appeals has applied to them a rule of decision different from, and contrary to, other decisions of this court upon the same conditions, and has thereby inaugurated a system of inharmony and confusion in our jurisprudence, and in support of the allegation cites certain cases which have been decided by this court as well as cases decided by courts of appeal in other circuits, which the Circuit Court of Appeals in the Ninth Circuit has refused to follow.

Among the cases cited which have been decided by this court are:

McBlain v. Gibbs, 17 How. 232.

Brooks v. Martin, 2 Wall. 70.
Planters' Bank v. Union Bank, 16 Wall. 438.
Railroad Co. v. Durant, 95 U. S. 576.
Armstrong v. Bank, 133 U. S. 434.

The important question to be first settled is to ascertain whether the "same conditions" prevailed in the cases cited as existed in the case of McMullen v. Hoffman, as they appeared before the Circuit Court of Appeal for the Ninth Circuit, in order to ascertain whether the latter court has refused to follow the rule laid down by the cases cited. A brief examination of these cases will be necessary to that end.

McBlain v. Gibbs, 17 How. 232.

The facts of this case, briefly stated, are: The "Baltimore company" had come into possession of certain money as the result of an illegal contract made in violation of the neutrality laws of the United States. One Goodwin owned a share in the company which, for a valuable consideration duly paid to him by one Oliver, assigned to Oliver his share and all his interest in said Baltimore company. Litigation afterward arose between the representatives of Goodwin and Oliver touching the validity of the assignment. It was sustained by the Court of Appeals of Maryland, and the fund distributed among the heirs of Oliver. Afterwards the assignee of Goodwin commenced another suit against the executors of Oliver to recover this fund. Oliver's executor pleaded the assignment to him by Goodwin. This Goodwin's assignee undertook to avoid by the claim that since the contract under which the fund sued for was acquired by the Baltimore company was illegal, Goodwin's assignment was illegal also, and therefore the assignment was void and could afford no defense to Oliver. This court held that the position of the assignee of Goodwin was not maintainable, and said, at pages 235, 236:

"The transaction, out of which the assignment to Oliver arose, was uninfected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him.

The assignment was subsequent, collateral to, and wholly independent of, the illegal transaction upon which the principal contract was founded. Oliver was not a party to the transactions, *nor in any way connected with them.*" The court proceeds thus: "It may be admitted that *even a subsequent collateral contract if made in aid and in furtherance of the execution of the one infected with illegality, partakes of its nature, and is equally in violation of law;* but that is not this case."

In its facts this case does not even resemble the case of McMullen v. Hoffman. The money which had been realized out of the illegal transaction had been paid over to third persons in no manner connected with or privy to the illegal transaction, and the suit is brought to recover it back. It does not appear that Oliver even knew that there was any taint of illegality in any part of the business. The court plainly intimates that if the assignment to Oliver was for the purpose of aiding in or carrying out the illegal contract, he could not have the protection of the court, but since he was wholly innocent of any wrong or color of wrong, or of any knowledge that any wrong had been done by others, the court held that the law invoked did not apply to him. How does the condition presented by these facts compare with the facts disclosed by this record, showing McMullen's relation to the fund here in controversy? Does this record show that McMullen was an innocent assignee of an interest in an illegal contract? What does he say about it? In his original bill McMullen alleges, Rec., Vol. 1, p. 5 (7), "that before the time named in said advertisement (advertisement for bids for the waterworks of the City of Portland) within which bids were to be received for the construction of said waterworks, *it was* agreed by and between the defendant and your orator that they would jointly endeavor to obtain the contract for the same or some part thereof, and that in their joint interest a bid should be put in for the construction of said waterworks, or for the construction of a portion thereof, and that in case they were success-

ful they would ***share equally in such contract as resulted from their bid;*** that pursuant to said agreement between the defendant and your orator, and in their joint interest, a bid was put in by the defendant in the firm name of Hoffman and Bates, under which name defendant was engaged in business, for the manufacture and laying of steel pipe from the head works of said system to Mount Tabor, which bid was found to be the lowest bid for said work, and the defendant was declared to be the lowest bidder and entitled to a contract with said City of Portland therefor; ***and thereupon***, in ***evidence*** of the interests had by the defendant and your orator in said bid and the contract with the water committee to be entered into thereon and the work to be done thereunder, on the 6th day of March, the defendant and your orator entered into a certain written agreement under their hands and seals that they would share equally in such contract as should be entered into between the defendant and the City of Portland touching the work covered by said bid, each of them, the defendant and your orator, to furnish and pay one-half of the expenses of executing said contract, and each to receive one-half of the profits, or bear one-half the losses which should result therefrom; and, further, that in case either party to said contract should get a contract for doing or should do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses of said contract or work should be shared and borne by the defendant and your orator equally."

The bill further alleges in substance, Rec., Vol. 1, p. 6 (8), that a contract was afterwards and on the 10th day of March, 1893, in the joint interest of himself and your orator, the defendant entered into a written agreement with the City of Portland, in the name of Hoffman and Bates, for the performance of the work required to be done under said bill. It is further alleged in said bill, Rec., Vol. 1, p. 7 (10), that your orator and the defendant entered upon the performance of said work immediately after said contract with the city was exe-

cuted, and completed the work of manufacturing and laying said pipe on January 1, 1895.

In his deposition, Rec., p. 171 (240), McMullen, the petitioner, says in substance:

"Whatever consultations I had with Hoffman relative to procuring the contract from the water committee was with a view to myself and he performing the work together in case we got the contract. I think whatever work I afterwards did in the way of manufacturing and laying the pipe was a result of my arrangement with Hoffman for procuring the contract in the first instance. Rec., Vol. 1, pp. 174, 175 (244-5-6). When Hoffman and myself were figuring upon a bid for manufacturing and laying the pipe in question, we had a verbal agreement together to be partners in the performance of the contract if it was awarded to us. We had a tacit understanding, as our correspondence will show. We bid for it (the work of manufacturing and laying the pipe) with the idea of getting the contract and doing it if we got it, Hoffman and I together, as partners. After the work had been awarded Hoffman and myself had our contract of partnership put in writing, stating such were the facts as the new condition of things had brought into existence. We couldn't have done it before."

This somewhat extended statement of the contents of the bill and the testimony of the petitioner has been made for the purpose of calling to the special attention of the court the fact that according to his own showing McMullen, the petitioner, had been by his own claim an equal partner with Hoffman in this entire business, from the first of their negotiations to secure the contract, and that the written agreement of copartnership upon which so much importance is placed was no more than a formal reducing to writing of an agreement that had existed in fact from the first.

The facts then, as shown in this case, are that Hoffman and McMullen entered into a partnership agreement to undertake to secure a contract with the City of Portland to manufacture and lay certain pipes for conducting water to the City of Port-

land. The contract was to be let by public letting upon sealed bids to the lowest bidder. If the contract was secured the work was to be done, and if profit was made it was to be divided between Hoffman and McMullen. This profit was the sole object for which the bids were put in, and the work done. The contract was secured, and the work performed. Hoffman actually did the work, and had received a portion of the pay therefor. He refused to account to McMullen, and McMullen sued for an accounting and a division of the profits resulting from the execution of the contract with the city.

On the trial the evidence disclosed the fact, as found by the Circuit Court of Appeals, that the contract which McMullen and Hoffman had with the city was procured by means that were illegal and fraudulent. The Circuit Court of Appeals found, as the petition herein states, pp. 8, 9, that a corrupt agreement had been entered into between petitioner and Hoffman to stifle or suppress competition in bidding for the work for which bids were invited by the City of Portland, of which the manufacturing and laying of pipes was a part.

That, in consideration of sharing in profits on work awarded upon the bid submitted, petitioner put in a fraudulent bid higher than he otherwise would have submitted. That the bid put in by petitioner was higher than that put in by Hoffman, for the same work, and that said higher bid was submitted with a fraudulent object, for the purpose of deceiving the water committee of the City of Portland, and that the fraud was in petitioner and Hoffman holding themselves out to said committee as rival bidders. That petitioner and Hoffman employed illegal means to obtain the award of said contract. That Hoffman never paid or agreed or promised to pay to McMullen any part or portion of the money received by him for the execution of said contract. From all these facts it seems as clear as any fact can well be proved that it was as much a part of the real partnership agreement, although omitted from the written paper, that the parties should practice the

fraud which the court has found was practiced in fact, as it was to execute any part of the work, if by means of the fraud the contract should be secured. A single quotation from a letter written by McMullen to Hoffman, and referred to by the judge who delivered the opinion of the Circuit Court of Appeals, will show the methods adopted by this partnership. The city's system of water works required the water to be conveyed underneath the Willamette river at Portland, and the part of the work for which bids were invited was for providing and laying these pipes. McMullen and Hoffman had an eye on this work and this is how they proposed to get it. McMullen writes:

"I do not want to let go of the submerged pipe; want to get the job. I think we can make $25,000 on that job, but we must pool it. To do this we will have to let the secretary, Frank T. Dodge, in, and, if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened; and we will gather in everybody that is personally represented. Don't think there is many."

It is to this state of facts that counsel for petitioner claims the court erred in not applying the rule laid down by this court in McBlain v. Gibbs. The records of the two cases present conditions as unlike as could well be supposed.

In McBlain v. Gibbs, Oliver, the assignee of the share of Goodwin in the Baltimore company, had no other connection with the affairs of the company than that he had become the assignee of a share in it. This had been paid over to him, and the representatives of Goodwin sought to recover back.

In this case, a great fraud had been practiced by McMullen himself, and to secure the fruits of that fraud he is now before the court asking its aid. It is claimed that his own fraud in procuring the contract with the city was a completed transaction when the contract with the city was signed, and that the formal execution of a written agreement of copartnership between himself and Hoffman to execute the contract so fraudu-

lently obtained, inaugurated a new condition of things. That the contract of partnership operated as an equitable assignment of a half interest in the contract with the city procured through the agency of his own fraud, and in that way McMullen had not only purged himself of the fraud he had practiced, but the equitable assignment, resulting from the partnership agreement, was in effect equivalent to an actual delivery to him of the profits to be realized by the performance of the work, and that he is therefore in the same position in his relation to the contract with the city as Oliver was to the contract from which the money which had been paid to him had been obtained by the Baltimore company. This contention cannot be sound. The case of McBlain v. Gibbs is an authority directly against it. If it were conceded that the execution of the partnership agreement operated as an equitable assignment of a half interest in the contract with the city, it by no means operated as a delivery of the profits of that contract to the assignee. No profit had been earned, and such delivery was impossible. The most that can be claimed for it is that it operated as an assignment of an interest in the contract, but the assignee took it burdened with any illegality by which it was afflicted in the hands of the assignor.

The act which relieved the fund paid to Oliver of the illegality by which it was affected, was its actual payment to him as assignee, he being innocent of all connection with the illegal acts which tainted the fund in the hands of his assignor.

In McBlain v. Gibbs, the court say, at page 236:

"Oliver, by the assignment, became simply the owner in place of Goodwin, and as to any public policy or concern supposed to be involved in the ***making*** or in the ***fulfillment*** of such contracts, it was a matter of entire indifference to which it belonged. In consequence of the illegality, the contract was invalid, and incapable of being enforced in a court of justice."

The contention that what is claimed as an equitable assignment to McMullen by the execution of the con-

tract of partnership, operated as a delivery to him of his share of the profits, so as to make the rule in McBlain v. Gibbs applicable to him, seems absurd, and especially so when it appears, as it does in this case, that McMullen was himself one of the chief actors in practicing the fraud which made the contract, which it is claimed was assigned to him, illegal; and when it further appears that there never was a moment of time, either before or since the partnership contract was signed, that McMullen does not claim to have been an owner in his own right of a half interest in the contract with the city, so that the assignment, to which so much importance is attached, is no more nor less than a formal declaration of what was his already. Besides, if the pretended assignment was a delivery to him of the interest assigned as the fund was delivered to Oliver, what occasion has he to come into any court for aid or relief? Oliver was not suing to get his interest under the assignment. He had received it, and the suit was to recover it back.

It appears from the record in this case that the privilege of performing the work mentioned in the contract with the city was the sole aim and object of the bidding in the first instance, and it was through that means that profits were to be realized, and it was to secure these profits that the fraud was perpetrated, and the very work which the partnership, which it is claimed was created by the contract, set out in the record, was solely for the purpose of the "fulfillment" of the fraudulent contract which McMullen had himself been forward in securing. The right to manufacture and lay the pipe was the very thing the fraud was practiced to secure, and the act of doing the work was as much in "fulfillment" of the original scheme as was the act of putting in the fraudulent bids. It is said by counsel for the petitioner that the contract of partnership was legal and for a lawful purpose. It is not denied that a contract formed for the purpose of doing such work in a legitimate way is lawful and proper. So is bidding at public letting lawful and proper when lawfully and properly done; but

when such bidding is done for the purpose of defrauding the public or another, and through the agency of such fraud contracts are secured for the performance of which further action is required, combinations or partnerships entered into by the perpetrators of the fraud for the fulfillment of such contracts cannot be said to be legitimate or lawful.

The case of Brooks v. Martin, 2 Wall. 70, upon which counsel for petitioner seem chiefly to rely, though not, in its facts, identical in all respects with the facts in McBlain v. Gibbs, they nevertheless present a condition so unlike the case now before the court as to make the rule there laid down inapplicable here. In that case the only illegal act was the purchase of soldiers' scrip. The act was illegal only because the statute authorizing the scrip to be issued, and donating it to the soldiers, declared that its sale should be void. No penalty was attached, except that a purchaser could not defend his title, if occasion required. The provision was inserted in the act for the sole benefit of the soldier. The purchase of the scrip, had not its sale been forbidden, would have been legitimate business, and its purchase under the circumstances was not an act involving any element of moral turpitude. The risk was taken by the purchaser of losing his money. No element of public policy was involved in the act of purchasing the scrip. It was nevertheless an illegal transaction, because, if entered into, the law would not uphold it.

The facts as they appeared in that case were that such scrip was purchased, in considerable amounts, with money which Martin furnished, and was delivered to Brooks, the active member of the partnership. This purchase completed the illegal transaction. The title to the scrip, as against everybody but the soldier, was in the purchaser. Thus possessed of the property, Brooks proceeded, by legitimate steps, in no manner connected with or dependent upon or in execution of the illegal contract of purchase, to and did carry the scrip, and the proceeds of the sale of it, through step after step of lawful business transactions, until consid-

erable profits had been realized. He presented the scrip to the department at Washington, where the title was recognized in him, and warrants for the land to which the holder of the scrip was entitled were issued to him. These warrants were afterwards laid upon lands. The lands, many of them, were sold, money realized from the sale, and afterwards loaned on mortgages. Every step along the whole line after the purchase of the scrip was a legal and legitimate use of money in the hands of the partnership, and the profits sought in that case to be recovered were the result of, and had been realized from, these legitimate transactions, every one of which, as has been stated, was independent of and unaffected by and in no way in aid of the execution of the illegal contract. To this state of facts the court laid down the rule in Brooks v. Martin.

Now, counsel for petitioner say the Circuit Court of Appeals has committed a grave error because it has said that the rule properly and correctly applied in that case does not apply to the facts disclosed by the record in the case of McMullen v. Hoffman. It seems to me that an element in distinguishing the two cases which ought not to be lost sight of is that in the former the illegal act was illegal only because the sale of the scrip was forbidden, and in no way involving any public interest, while in the latter the fraud complained of reaches every interest of the nation, and of the states, and of municipalities, and of individuals, where any manner of improvement is to be made or any labor is to be done, and its price to be determined by competition through public lettings upon sealed bids. If the course shown to have been pursued in securing this contract can have the aid of the courts to uphold it, and the contracts so secured can be enforced, then the business of inviting competition by bidders at public lettings is the sheerest mockery, and becomes a most efficient agent to replace integrity by rascality and in the place of honesty install fraud.

Not a case is cited by counsel for petitioner growing out of or based upon a state of facts bearing any near

resemblance to the facts in the case of McMullen v. Hoffman. The cases cited by counsel are those only in which the illegality complained of was the violation of some statute, or some act of like nature.

The facts in the case of McMullen v. Hoffman are not without precedents involving the same principles, and the courts have laid down rules applicable to them. These rules do not in any manner conflict with any decision of any court of the United States upon the same conditions. It is this class of cases that the Circuit Court of Appeals understood as laying down the rule of decision in this case. These decisions were followed by the court of appeals, and led it to a conclusion adverse to the petitioner.

No attempt will be made by me to examine or comment upon these cases. The whole subject has been so carefully and ably presented in the opinion of the court of appeals by Justice Hawley, that further comment by me would be quite out of place, and this remark applies to all the criticisms of counsel upon the opinion. It is only needful for the purposes of this application to refer to the opinion itself for a complete answer to them.

The second paragraph of the petition presents a question not specially presented to the attention of the court of appeals at the hearing. The attention of the court was first directed to this question in the application for a rehearing where the subject was first discussed in counsel's brief.

The petition alleges "that if the decision of the Circuit Court of Appeals in this cause were correct with reference to the contract made by the City of Portland with Hoffman and Bates for manufacturing and laying pipe, for the reason assigned therefor, such reason affords no ground for refusing to award your petitioner his share of the profits made on other work performed by your petitioner and said Lee Hoffman, as co-partners, for the City of Portland, subsequently to said bidding and to the making of said contract, and entirely independent of them."

The special matters which it is claimed do not come

within the contract with the city, are, 1st, $14,496.74 for extra work, not specified in the contract; 2d, a store, etc., from which $15,339.76 was realized; 3d, a disputed claim against the city for $16,961.25; 4th, other partnership assets which cost $7,857.36. Petitioner alleges that the decree of the circuit court is erroneous in not allowing to petitioner his alleged share of these items.

A complete answer to this claim for the purposes of this proceeding is, that the question presented by it is not of such "gravity and importance" as to call for the interpositions of this court, through its writ of *certiorari*. If questions like this are to be brought here by the use of this writ, for the sole purpose of correcting some supposed errors of the court of appeals, instead of this court being relieved of a portion of its labors by the court of appeals, the result will be that every litigant defeated in that court will become a petitioner for this writ, and the labor of this court will be doubled instead of reduced. The reservation, to this court, in the act creating the court of appeals, of the right to issue this writ, was not designed for any such purpose. This court has declared that the writ should be "sparingly used, and only in cases of gravity and importance." This is not such a case. The case made by this allegation in the petition shows a design to convert this court into a court of appeal to correct errors alleged to have been committed, in matters of minor import, for the full understanding of which a careful and laborious examination of the facts of the case must be made, in order to ascertain whether an error has been committed.

The facts relating to the subject as they are to be gathered from the record will not support the allegations of the petition.

The contract for manufacturing and laying the pipes for the city water works was accompanied by specifications upon which the bidding was based, and the right was reserved by the city to make such alterations, deductions or additions thereto as in the opinion of the engineer in charge of the works for the city should direct, and

if in making such alterations, deductions or additions the expense of the work should be increased or diminished, the value of such increase or decrease should be added to or deducted from the price of the work. If additions were made not specifically pointed out in the contract, this was extra work, but it was such work as the contractor was bound to perform, although he was to receive for it extra compensation. Such is the character of that work for which the item of $14,496.74 is allowed as extra work, and it is idle to pretend that this work was not as much a part of the work of manufacturing and laying the pipe as was the work specifically enumerated, and was equally within the contract, and was performed in pursuance of it. This appears to have been the view taken by the Circuit Court of Appeals. It is such a matter which the petitioner by this proceeding seeks to have certified to this court for review. Of the same nature precisely is the disputed and disallowed claim of $16,961.25. This demand is based upon the claim of Hoffman, that in performing the contract he had, in pursuance of its requirements, performed labor of the value named, and demanded compensation from the city, while the city, through its committee, claimed that the services so rendered, and the money so claimed to have been earned, was within the contract, and no extra compensation was due. It is true that it was stipulated that such a claim had been made, and it is equally true that if anything was due upon it, or any division could be made of it, some court must first find that it had been earned outside the original contract with the city. Will this court issue its writ of *certiorari* to bring here for review such a question?

And as to the matter of the plant on hand in the possession of Hoffman at the time of the completion of the work said to have cost $7,857.36, the testimony in the case shows that this was a part of the appliances used in the completion of the contract and as much included in it as the pay for the labor of any man employed was a part of the expense of it. And all this

was a part of the means understood by the parties when they were figuring to get the contract; when they were contemplating and practicing fraud by which they obtained it, which must be employed to secure the profit which was the sole incentive to all their actions in the matter.

The item of $15,339.36, profit derived from a store, boarding laborers, and other sources, is shown by the evidence to have been earned in the execution of the contract with the city. The establishment of a boarding house for the purpose of feeding the men employed in the work, and keeping along with the work as it progressed a supply of such goods as were needed by the employes while at work, was simply one of the instrumentalities for the successful, speedy and profitable execution of the contract, and, while this business was carried on the books as a specific item, it was so carried in the books relating to the work required for the performance of the contract, and was a part of it. Besides, if this business was not a legitimate element in the work to be done under the contract with the city it was not within the terms of the contract of partnership. This partnership agreement included no business except such as should be required for executing some contract with the city relating to the business of bringing Bull Run water to Portland.

The language of the contract is: "And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or do any other part of the work let or to be let by said committee *for bringing Bull Run water to Portland*, the profits and losses thereof shall in the same manner be shared by the said parties equally, share and share alike."

It is not claimed that any other contract than that for manufacturing and laying the pipe in the execution of which all the profits referred to in the petition were earned, was even entered into, and nothing showing or tending to show that either the petitioner or Hoffman regarded the arrangement for boarding laborers or other work, and providing supplies for their convenient

use, as anything else than instrumentalities for the execution of the contract. This claim is plainly an afterthought, and falls far short of showing a case of such "gravity and importance" as will justify the issue of this writ.

The seventh paragraph of the petition alleges that there was error by the court of appeals in finding and determining that "the relief prayed for required the court to investigate" all the transactions found by the court to have been illegal and fraudulent, as a prerequisite to a determination in petitioner's favor."

An examination of the record will show that the averments of the answer fully set out and explained the circumstances under which the contract of the city with Hoffman and Bates was procured and the fraudulent conduct of the parties, by which its true character was presented. The petitioner filed exceptions to this matter in the circuit court, and presented the same reasons in support of them as are now here urged. The circuit court overruled the exceptions, and delivered a forcible and able opinion in support of its conclusions, which is in the record now before this court, to which attention is directed. Rec., Vol. 1, p. 58.

From this decision no appeal was taken, and it became the rule of the case for the taking of testimony upon which the case was tried and decided. If error was committed, which cannot be admitted, it would seem that it was cured by filing a replication and acquiescing in the decision, and petitioner ought not to be allowed to avail himself of it at this time as a basis for this proceeding.

Besides, the subject had the attention of the Circuit Court of Appeals, and is discussed in the opinion rendered, where the authorities are cited. The reasons there presented against the contention of counsel are so clearly stated and the conclusion so abundantly supported that nothing more need be added.

It will be observed that the grounds upon which the petitioner chiefly relies for this proceeding are that if it be conceded that McMullen and Hoffman were guilty

of the frauds charged and found by the court to have been practiced in securing the contract with the city, and that a court of equity would not enforce such a contract on account of its illegality, nevertheless, in this case, after the parties to the fraud had, by the fraud, succeeded in placing themselves in a position where they might despoil the city, by executing the contract their fraud has secured, they could and did escape all the consequences of their rascality by converting themselves into a partnership, to do the work, the principal thing which, in their scheme, they knew must be done, in order to realize the benefits of their misconduct, and then say that this court in Brooks v. Martin has laid it down as a rule of law that by the trick of the partnership these parties purged themselves of their fraud and the contract of its illegality, so that a court of justice must lend its aid to enforce such contract, when but for the partnership it would not have done so. For an answer to this contention the court's attention is directed to the opinion in this case found on page 613 of Vol. 2, Rec.

It is respectfully submitted that this record shows no proper cause for the writ of certiorari to issue.

RUFUS MALLORY,
Attorney for Respondent.

No. 271.

Brief of Mallory for Respondent

SUPREME COURT

Filed Apr. 4, 1899.

OF THE UNITED STATES.

OCTOBER TERM, 1898.

JOHN McMULLEN, *Petitioner*,
v.
JULIA E. HOFFMAN, Executrix of the last will of LEE HOFFMAN, deceased, *Respondent*. } No. 271.

Brief of Respondent.

RUFUS MALLORY,
Attorney for Respondent.
DOLPH, MALLORY, SIMON & GEARIN,
Of Counsel.

PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 228 OAK STREET,
1899.

Due service of the within brief by the delivery of a duly certified copy thereof, at Portland, Oregon, on this 2 day of March, 1899, is hereby admitted.

L. B. Cox.

of Attorneys for Petitioner

Due service of the wi[thin]

Writ by the delivery of a

certified copy thereof at

Portland Oregon on the

day of March 1899 is

admitted

Counsel for Pl[aintiff]

IN THE

SUPREME COURT

OF THE

UNITED STATES.

JOHN MCMULLEN, *Complainant*,

v.

JULIA E. HOFFMAN, Executrix, of LEE HOFFMAN, deceased, *Defendant.*

STATEMENT.

The legislature of Oregon authorized the City of Portland to issue its bonds to raise funds for supplying the city with water, from a stream about thirty miles distant, called Bull Run river. The act authorizing the bonds provided

for the appointment of a committee of the citizens of Portland, known as the Water Committee, and gave to this committee entire charge of the proposed work; gave them authority to sell bonds, and exclusive control of the entire undertaking. The proposed work was divided by the committee into two sections; one from Bull Run river to Mount Tabor, a distance of about twenty-five miles, and the other from Mount Tabor to the city, about five miles. The five-mile section crosses the Willamette river. Works were required at the point where the water was to be taken from the river, and bridges were required in crossing streams, and in crossing the Willamette river the pipe is laid on the bottom of the river, and is referred to as the "submerged" pipe.

The committee was authorized to let this work to the lowest bidder upon sealed proposals. It was divided into several classes, thus:

Headworks.

Bridges.

Wrought-iron plates.

Manufacturing and laying steel plates.

Cast-iron conduit from Mount Tabor to Portland.

Submerged pipe.

In 1887 bids were invited for this work. At that time the San Francisco Bridge Company, a corporation organized under the laws of California, having its place of business at San Francisco, of which the plaintiff, John McMullen, was the principal stockholder and manager, was en-

gaged in contracting for work of this character. Lee Hoffman resided at Portland, and was engaged in like business, under the name of Hoffman & Bates. The San Francisco Bridge Company was a bidder at the letting in 1887, and was the lowest bidder on the item of manufacturing and laying the pipe from "head works" to "Mount Tabor," but the contract was not let, the act authorizing the bonds having been vetoed by the governor. Afterward an act passed authorizing the bonds, and it was known that the work would be done.

About 1891 an agreement was made between the San Francisco Bridge Company and Hoffman & Bates that they would unite in procuring a contract or contracts for doing this work, and would do whatever work they could secure contracts for; would each furnish half the money necessary to execute any contract they might secure, and bear equally the losses or share equally any profits which might result from the undertaking. In short, they formed a partnership, the object of which was to perform such work as they could secure contracts for when the same should be let by the Water Committee, to pay in equal proportion the expenses, bear equally the losses, and divide equally the profits resulting from doing any work. The Water Committee again invited bids for the work, to be presented on the 1st day of March, 1893. McMullen, in the name of the San Francisco Bridge Company, and Hoffman, in the name of Hoffman & Bates, were bidders at this letting, but instead of bidding in the joint name of the

San Francisco Bridge Company and Hoffman & Bates, in pursuance of their agreement, they kept the fact of their agreement and joint interest secret from the committee, and submitted bids severally, McMullen in the name of the San Francisco Bridge Company and Hoffman in the name of Hoffman & Bates, thus representing themselves as being competitors for the work bid for. When the bids were opened, on the 1st day of March, 1893, the bid of Hoffman & Bates was found to be the lowest for manufacturing and laying the pipe, and the contract for that work was awarded upon that bid. On the 6th day of March, 1893, McMullen and Hoffman reduced to writing so much of their original agreement as had not been executed in procuring the contract.

On the 10th day of March, 1893, a contract was entered into between the City of Portland by the Water Committee and Hoffman & Bates, in pursuance of the said bid, and the award made thereon.

The methods adopted by McMullen and Hoffman to procure contracts from the Water Committee will most clearly appear by the correspondence which passed between them before and after the contract of March 10 was signed, to which the attention of the court is called. The first letter in this correspondence is from McMullen to Hoffman, dated December 31, 1892 (R., p. 518). We quote the following:

"Mr. Lee Hoffman, etc.—Dear Sir: The Risdon Iron & Locomotive Works sent for me yesterday, and told me that if I had any pull, or had any friend in Portland who

had a pull, to get in and use it with the Portland Water Commission, as the Oregon Iron & Steel Company were trying to get the commission to adopt cast iron pipe for the Bull Run pipe line, claiming that they have a mine in Mexico from which they get a very superior ore, and that they could make cast iron pipe that would stand a tensile strain of 24,000 pounds to the square inch; while the best pipe-makers in the East claim 16,000 to 17,000 pounds to the square inch is the most that cast iron pipe will stand. If the Oregon Iron & Steel Company can prevail on the commission to adopt cast iron, it would virtually create a monopoly for them, as they are the only ones there who make cast iron pipe, and the Risdon people tell me that they can make it there in Oregon cheaper than one can import it from the East.

"As you are acquainted with the Water Commissioners, and have social and business relations with many of them, I think you are in position to counteract this movement; and if we are to make anything ultimately out of this job, it will be necessary to knock out this scheme. Get in and do what you can to beat it. I understand the Oregon Iron & Steel Company have a big pull in the commission. What you do must be done at once, as I understand they are to determine the matter at a meeting to be held next Tuesday."

The next letter in this correspondence is from Hoffman to McMullen, and is dated January 23, 1893 (Record, p. 562), and is to the effect that "the Bull Run pipe line will be let about March 1, and will be wrought iron most of the way. Committee will take bids on cast and wrought iron, but the cast pipe will have to be the standard sizes, and so I am satisfied the O. I. & S. Co. cannot get more than about eight miles. Now, Mac, this is a pretty large contract, and requires a good deal of capital, and I think we ought to put up some kind of a combination on it. I do not care to have this contract all alone, and I was thinking it would be a good plan if you, Risdon Iron Works, Wolff & Zwicker, and myself, would go in on it together and take the work. I am willing to go in with you alone on the contract; but both the Risdon and Wolff & Zwicker are strong teams, and I think if we would combine we

could take the contract and make more out of it than if any one went in for it by themselves. If you think favorably of this plan, you see the Risdon people and I will see Wolff. Let me know at your earliest convenience just how you feel about this. The only people I fear up here is Wolff & Z., and I think if we combine this way we would have a very strong team. . . . Now, Mac, I don't think we will be able to put up a pool on this work unless we could take in the O. I. & S. Co. (Oregon Iron & Steel Company), and I doubt it very much if they would come in. Of course, if we found out that we could put a pool up on it, each *one of us could go in separate.*"

To this letter McMullen replies, under date of January 26, 1893 (Record, p. 519), and, referring to the proposed combination, says:

"From correspondence that I have seen between the Risdon and Wolff & Zwicker, I am satisfied that they are pretty intimate, and that they will pull together in some form. Now I do not think that they will take us in, unless we convince them that we are going to make a hard bid for the work. Do not let them know that you do not want the job. I do not think that the Risdon wants so many partners in the contract. They might take Wolff & Zwicker in, but I do not think they would take you and us in. I think that we could do better by making them buy us off. The Risdon is a large, wealthy, forehanded concern, and they will make a hard fight for this job. I think that *we bid so hard on the job before*, that if they think we are going after it on the same line again that they will be disposed to capitulate with us. I think you ought to make Wolff & Zwicker understand that you and I are together, and that we are going to hit the job hard; then, if they make satisfactory inducements, when the time comes we will quit. I am pretty close to the Risdon. Have been in several deals with them. We were in with them on the contract for furnishing the dredger and doing the dredging at Honolulu—about $15,000 worth of work. They took me in because they could not very well get along without me: we had a half interest in the deal. If they think they can throw you and me overboard, they will do it in a minute, so I do not think we ought to talk

partnership at all; on the contrary, talk 'get the job.' Then, if they are afraid of us, they will buy us off. Of course there may be so many bidding on it that it would not be worth while buying off one unless they were going to buy them all off, but this will develop later. Perhaps the O. I. & S. Co. could be gotten out of the way by giving them the cast-iron work, as I do not think the Risdon could compete with them on that portion of the work. Yet the O. I. & S. Co. might get a better price for that portion of the work if the Risdon and us should agree to let them alone on it, on the condition that they let the wrought-iron part of it alone."

Under date of January 30, 1893, Hoffman replies to McMullen's letter of the 26th, and says:

"Dear Sir: Yours of the 26th at hand and note what you say about the Risdon people not wanting too many partners. I have been talking with Wolff in an offhand way, telling him that I thought it would be a good scheme if such a combination could be made, but I think W. & Z. and the Risdon people have some kind of a deal, so I did not say much. As you say, *we* must do some rustling in the East if *we* want this work. Now my idea is to get this iron punched and planed in the East, so that all *we* would have to do here would be to roll it when it came; that would save a lot of machinery, and I think it could be planed and punched cheaper in the East than here. I will enclose you a list of what it will take, and the strength required. This will have to be iron (not steel) and I think if you can give this to Mr. Catt and if he has got the time to look after it, he could give it to some iron broker, and let him get *us* good prices, and *we* ought to get this work, or at least part of it. I will go out over the line as soon as the weather settles a little.

"The specifications are not yet out, but expect to get them tomorrow, and will mail you a copy. The committee estimates that it will take two and a half million dollars to complete the entire work. We would not have to bid on all if *we* did not wish to. About Wolff & Zwicker's financial ability—they can get all the backing they want, and their credit is very good.

"I don't hardly think I will be in San Francisco until

after the contract is let. Why could not Geo. W. Gibbs give good prices on the plates? He knows all the plate mills and ought to do the work on a very small per cent. on such an order as this would be. Think it might pay to see him."

Hoffman writes to McMullen again, under date of February 3, 1893 (Record, p. 565):

"Dear Sir: I left an order with Col. Smith today to mail you five copies of specifications, as per your telegram. He expects to get them from the printers so that he can mail them to you this P. M., or tomorrow sure.

"You will see that the work is all split up, so I don't think it is as good for us if it had been all let in one job. I will do what I can to get prices on the iron, and when you come up *we* will make up *our* mind what to bid on. *We* ought to get a part of this work anyway.

"The O. I. & S. Co. will bid on the entire contract, unless we could get them off as you suggested. Anyway, the time is short, and *we* will have to rustle hard to get in shape to make a good bid."

McMullen to Hoffman, February 6, 1893 (Record, p. 521):

"Dear Sir: Please send the strain sheets and blue prints of the plans of the bridges, including profile; also blue prints of the ball joints and any other plans for the pipe line that you may have. I have sent three copies of the specifications to Mr. Catt, and instructed him to get the cost of plant for manufacturing pipe, and also the cost of manufacturing pipe, together with the cost of lap-welded pipe for the submerged portion; also cost of ball joints.

"I will probably be up there about the 25th of the month, at which time I will have a report from Mr. Catt on these things. ***I also have the old estimate, very full and complete***, that we made five years ago, when the work was offered before. As I said before, I think the important thing is to make Wolff & Zwicker think we are going to hit the job hard; then they will tell the Risdon; then *we* will see what *we* can do when *we* get there. . . . Also please send Mr. Catt, room 183 World building, New York

City, copies of all the blue prints mentioned, or that they may have, illustrating the work."

Hoffman to McMullen, February 8, 1893 (Record, p. 565):

"John McMullen, Esq.—

"Dear Sir: I herewith send you strain diagrams on file for the bridges, profiles of the crossings, and details of the ..... and profiles of the bridges. The general plans I cannot get now, but expect to have them tomorrow and will then mail them to you. The engineer has changed his mind on the steel question, and has concluded to ask for bids on steel also, but iron will be preferable, all things being equal, and instead of having one pipe 33 in. diameter for the submerged pipe, two 26-in. pipes will be preferred. I will advise Mr. Catt about this."

McMullen writes Hoffman, under date of February 8, 1893 (Record p. 522.)

"Mr. Lee Hoffman—

"Dear Sir: We have schemed and figured a great deal the last three or four days on the Bull Run pipe line, and we are getting enamored of the job, ***and I think the way to make some money on this proposition is to do the work***. There is nothing in furnishing the iron, as undoubtedly the iron men will bid direct as per specifications, and I suppose we will have to give the Oregon Iron and Steel Company the cast iron.

"We understand it is settled that the cast-iron pipe will be built from Mt. Tabor to the city reservoir—5½ miles—and that the other 24 miles from the head gate to Tabor will be of wrought-iron pipe. Write me if this is correct. Although they take bids for cast iron, too, for that later. I figured it up roughly, and I think that the cast-iron pipe on this latter would cost about $400,000 more than wrought iron, and that on the other piece, from Mt. Tabor to the city reservoir, will cost about $100,000 more than it would if they did it in wrought iron; and as it is no better I think this is quite a gift that the water committee will be making to the Oregon Iron and Steel Company.

"*We* will have to make the Oregon Iron and Steel Com-

pany know, when the time comes, that if they ***do not quit and let go on everything except the cast iron*** that ***we*** will hit them hard on the cast iron, and make it rocky for them, as I understand from interviewing cast-iron pipe men, who have agents here, that they can put that cast iron down in Portland ***cheaper*** than Portland men can make it, and better, too. I shall have some figures from the McNeal Pipe Foundry, one of the largest pipe manufactories in America; their representative was in the other day. I have made very full inquiries in the East, and Mr. Catt is going to devote his entire time next week to getting prices on cast and wrought-iron pipe, and the cost of plant and equipment for doing the work, and other matters relative to the job. I want you to make very full and thorough investigation, too, and then ***we*** will compare notes. I do not think it will take much money to run that job; think perhaps the plant, including building, is worth somewhere from $25,000 to $40,000, but this practically all the investment ***we*** would need to have, as they are to pay 90 per cent. every month, and that ought to pay all bills; only thing would be to see that the estimates are kept full, which I do not think would be any trouble in doing with old man Smith. I think you ought to ascertain (offhand and without apparently caring to know) just what the Oregon Iron and Steel Company do want in the job, and whether they will be satisfied with the cast iron or not, and how far you think the committee would go to favor them. If the wrong man should be the low bidder, do you think they would re-advertise the job over again to knock him out? I expect you to know all about ***this very important part of the business when I get there.***"

Under date of February 11, 1893, Hoffman writes McMullen:

"Dear Sir: Have mailed you under separate cover today general plans for the three bridges. I did not send these to Mr. Catt, as it is like pulling teeth to get prints, as they cannot make them fast enough. I sent him the strain diagrams, and I think that will be sufficient for him to get prices on, as I am sure the engineer will not be particular about details after a person gets the contract.

"Now, Mac, you are altogether mistaken if you think

the O. I. & S. Co. will not bid hard on the entire pipe line; they will be about as low as the wrought-iron men, if not lower. The committee will not pay any more for the 24 miles from Mt. Tabor to the head works for cast than they will for wrought iron, and I doubt it very much if they would take cast iron for that part at all. However, the O. I. & S. Co. have a big pull on the committee, and if they get down as low as the wrought iron they may be able to pull it through. Get the very best price you can on cast iron. I will try and get prices from the O. I. & S. Co. on pipe, and will then see and have a talk with them and find out what they want. This work will be let to the lowest bidder, no matter who is so long as he is responsible. *I, of course, think the bids can be manipulated some way that we could work on the commission after the bids are opened.* We are to work on the matter and will have our figures in shape by the time you get here.

"I think the parties that get the contract for manufacturing and laying the pipe ought to furnish the iron; still, there may not be much money in the furnishing."

The next letter in the correspondence is from McMullen to Hoffman, under date of February 13, 1893, and relates to matters of the size of cast-iron pipe, in which it is suggested as coming from an agent of one of the pipe foundries East, that the water committee, in order to serve the interests of the O. I. & S. Co., had fixed upon unusual and odd sizes for the cast-iron pipe, that is, sizes not made in Eastern foundries, so as to prevent competition by Eastern manufacturers with the O. I. & S. Co. The letter is found on pages 523, 524, 525, record, and is not copied here.

This ends the correspondence between the parties which took place prior to the letting of the contract on March 1, 1893. On March 8 (Record, p. 525), McMullen writes Hoffman.

Besides this correspondence the testimony taken in the case, and appearing in the record, shows some of the things actually done by McMullen and Hoffman in preparing the bids for the work to be done, and the character of their acts and their relations to the transaction. Refer-

ence is made to these transactions at this time, and in this order, for the purpose of placing before the court in the plainest and clearest method possible, the exact situation of the parties (Hoffman & McMullen) when this suit was begun.

The word "we," when used in the foregoing correspondence, refers to and means Lee Hoffman and John McMullen (Record, p. 165), (except when the word plainly refers to the San Francisco Bridge Company).

McMullen and Hoffman determined to operate together in procuring a contract or contracts for a part or all the work of constructing the water works from Bull Run river to Portland. They had much correspondence (see letters) and consultation. Mr. McMullen says (Record, p. 173), ***while*** Hoffman and himself were working together and preparing the bid for manufacturing and laying the pipe from head works to Mt. Tabor, he (McMullen) certainly had expectations of being partner in the work. That all the correspondence for three months prior to the time the bid was prepared will show that they had mutually agreed to be partners. McMullen says (Record, p. 171), whatever consultations he had with Hoffman relative to procuring the contract from the water committee, was with a view to himself and Hoffman performing the work together in case the contract was secured.

To the following questions, Mr. McMullen answered (Record, pp. 171-2):

Q. Whatever work you afterwards did in the way of manufacturing and laying the pipe was the result of your arrangement with Mr. Hoffman for procuring the contract in the first instance, was it not?

A. I think so.

Q. You and he made figures together for the purpose of bidding on this contract that was afterwards awarded to Hoffman & Bates, did you not?

A. We did.

Q. And the contract was awarded upon the bid prepared by yourself and Mr. Hoffman?

A. I think so; that is correct.

Q. Don't you know so?

A. Yes; I think I know it is so; if you will read the question again I will make it a little more explicit.

(The question is read.)

A. Yes; I know it is so.

(Record, p. 173.)

Q. Then I understand that while you and Mr. Hoffman were figuring together and preparing the bid for manufacturing and laying that pipe, you expected to be partners in executing the work, if you got it, if it was awarded on that bid?

A. Yes, that is correct; not only expected to be, but we had agreed to be.

(Record, p. 174.)

Q. . . . I want to know whether the substance, the general substance and purport, of that agreement (agreement marked plaintiff's Exhibit 1, hereafter to be described), had been understood between you and Mr. Hoffman prior to the time that that contract was awarded to Hoffman & Bates by the City Water Committee?

A. Well, I think I have certainly tried to make the matter clear.

Q. Let the examiner read the last question.

(Question read to witness.)

A. The general substance and purport—is that the language of the question?

Q. Yes.

A. Had been agreed upon—the purpose had been agreed upon? Well, it was agreed before the award had been made that we were to be partners. Now, after the award was made, this paper, Exhibit No. 1, is the identical

agreement that we mutually assented to. It was reduced to writing in Mr. Hoffman's attorney's office, and we both signed it. . . .

(Record, pp. 174, 175.)

Q. Let me put it in this form: When you and Mr. Hoffman were figuring upon a bid for manufacturing and laying the pipe for the Bull Run water works, did you not have an agreement together to be partners in the performance of the contract if it was awarded to you?

A. We had a verbal agreement.

Q. That is what I am asking.

A. A tacit understanding, as our correspondence will show better than anything else.

Q. Well, I am asking the question: Then it was with that idea in view that you and he bid together for the work, was it not?

A. We bid for it with the idea of getting the contract, and doing it if we got it.

Q. You and he together?

A. That is right.

Q. As partners?

A. That is right.

Referring to the same matter and for the purpose of showing the nature of the interest claimed by McMullen in the contract entered into by the water committee with Hoffman & Bates, hereafter to be described, the plaintiff, John McMullen, makes the following allegation in his bill of complaint (Record, p. 5):

"Your orator complains and alleges that prior to the 6th day of March, 1893, the City of Portland, a body corporate and existing by and under the laws of said State of Oregon, acting by and through its water committee, published advertisements inviting bids for the construction of a system of water works for said city, or for the construction of certain portions thereof, whereby water was to be brought from a certain stream, called Bull Run,

in the Cascade mountains, to said City of Portland, and there distributed for use; that before the time named in said advertisement within which bids were to be received for the construction of said water works, it was agreed by and between the defendant and your orator that they would jointly endeavor to obtain the contract for the same or some part thereof, and that in their joint interest a bid should be put in for the construction of said water works, or for the construction of portions thereof, and that in case they were successful they would share equally in such contract as resulted from their bid; that, pursuant to said agreement between the defendant and your orator, and in their joint interest, a bid was put in by the defendant in the firm name of Hoffman & Bates, under which name the defendant was engaged in business, for the manufacture and laying of steel pipe from the head works of said system to Mt. Tabor, which bid was found to be the lowest bid for said work, and the defendant was declared the successful bidder, and entitled to a contract with the City of Portland therefor. And thereupon in evidence of the interests had by the defendant and your orator in said bid and the contract of the water committee to be entered into thereon, and the work to be done thereunder, on the 6th day of March, the defendant and your orator entered into a certain written agreement, under their hands and seals, that they would share equally in such contract as should be entered into between the defendant and the City of Portland, touching the work covered by said bid, each of them, the defendant and your orator, to pay one-half of the expense of executing said contract, and each to receive one-half the profits or bear and pay one-half the losses which should result therefrom; and, further, that in case either party to said contract should get a contract for doing, or should do, any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses of said contract or work should be shared and borne by the defendant and your orator equally."

Mr. McMullen also says (Record, p. 221):

"The matter of joint action between myself and Mr. Hoffman, in regard to the water works of the City of Port-

land, under consideration, first came up several years before this job was awarded, when bids for building the Bull Run pipe line were taken in 1887, *after we were the lowest bidders*. At that letting Mr. Hoffman came to me and congratulated me, and said that we made a bold good bid, and that he did not think we knew so much about pipe lines, and said he was sorry that it was not going to go through; I think it was Governor Pennoyer that vetoed the bonds. He said: 'When this thing comes up again, Mac, we must go in together and see if we can get it,' and we frequently talked during the time that intervened between that occasion and December, 1892, when again negotiations were actively commenced, and it was understood the water committee were going to let the contract early in the spring."

Referring to the submerged pipe (Record, p. 212), Mr. McMullen says: "That was one of the sections of the work advertised by the water committee at the time that we secured the contract for the manufacturing and laying of the pipe. We had figured with a view to bidding together on that as well as the other."

This question was asked Mr. McMullen:

Q. That (meaning the submerged pipe) was included as much as anything else between you in the partnership, for all that was said between you on that subject, prior to the execution of the contract (Exhibit No. 1)? ?

A. Whatever was done prior to the partnership agreement, it was in the same condition as the job was secured; the submerged pipe, in our negotiations with each other, was in the same status as that relating to the pipe lines proper. We were interested together in the bid that was submitted (for submerged pipe). . . . (Record, p. 213): There was a bid submitted by Mr. Hoffman in which we were jointly interested. Submerged pipe was not let at the letting in March, 1893. There was a second letting.

Mr. McMullen says (Record, p. 214): ". . . I don't think I was in Portland at the time of the second letting. I think I furnished Mr. Hoffman what data and information I had relative to it, and I relied on him to put in the bid."

In this connection it will be proper and necessary to a proper understanding of the facts as they existed, in connection with this business at the time this suit was begun, and in order to show the motives which moved the parties in procuring contracts for work from the water committee, to quote a passage or two from a letter written by McMullen to Hoffman, under date of August 4, 1893 (Record, pp. 577-8):

"I do not want to let go of that submerged pipe; want to get the job. I think we can make $25,000 on that job, but we must pool it. To do this we will have to let the secretary, Frank T. Dodge, in, and if any bids come without personal representatives have him not receive them until after the letting, and then return them unopened, and we will gather in everybody that is personally represented; don't think there is many. Riffle has applied to MacNeil's agent here for bids on the cast iron, but we can control MacNeil's man here; he wants to work with us; his price will be about $32 a ton, and freight and insurance, primage and use of money, etc., which will amount to about $12 a ton, and which will make it about $44 a ton.

"I enclose you a rough approximate estimate, which our Mr. Wood has made, which shows that the wrought-iron pipe is not in it at all; that it will cost $20,000 more than the other.

"Another thing, Lee; I want you to see Smith & Watson, and see that they do not form any combination with any one else to bid on this work; take them in by giving them the cast iron, and hold them down to about what it is worth.

"The estimate we send you is made offhand, and is rough and only approximate.

"I think you can arrange to get Dodge into our camp."

For the purpose of showing the circumstances under

which the bids hereafter to be mentioned were prepared and submitted to the water committee, and also the understanding and agreement between McMullen and Hoffman in regard to them, reference is here made to the testimony of Harry Dean Bush, engineer, employed by Hoffman, and who had charge of and prepared the bid for manufacturing and laying the pipe upon which the contract was awarded, and who was present and heard the arrangements made between McMullen and Hoffman in regard to the bidding and the manner it was conducted, and the object of submitting so many bids.

(Record, p. 264), H. D. Bush says Mr. Hoffman had been away to San Francisco and McMullen returned to Portland with him (this was a few days prior to the 1st of March, 1893). Hoffman informed Bush that McMullen and Hoffman were going to bid together on the work. McMullen brought many figures and estimates.

(Record, p. 266), Mr. Bush says: "They, McMullen and Hoffman, had various conversations about the bidding; that they would bid together so as to try to get as much of the work as possible, and it was decided finally that Hoffman & Bates' bid should be the lowest or lower than the San Francisco Bridge Company's bid for the manufacturing and laying of the pipe, and the San Francisco Bridge Company's bid should be lower than Hoffman & Bates' bid for furnishing the plates, so that there might be a chance to combine those two bids on both those two items."

(Record, p. 267), Mr. Bush says: "There were a great many conversations in my presence, the general idea being that each would bid on his own account, and they would share in whatever portions of the work they might be successful in getting; as I before stated, Hoffman & Bates' bid should be lower for the manufacturing and laying, and the San Francisco Bridge Company's bid should be lower

on the delivery of the plates; that was the day the bids should be opened; that combination they were making to get as much work as possible."

(Record, p. 268): "By combining Lee Hoffman's bid on the manufacturing and laying with the San Francisco Bridge Company's bid on the delivery of the plates, or if there was no bid between this combination—the Hoffman & Bates' bid on the manufacturing and laying and the S. F. B. Co.'s bid on the delivery of the plates—the S. F. B. Co. was to try to withdraw their bid on the delivery of the plates so that the whole work should go to Hoffman & Bates.

"Hoffman and McMullen agreed in a general way that a bid by the S. F. B. Co. should be put in for the manufacturing and laying, which should be higher than the bid by Hoffman & Bates for the same work. It was understood between them that this should so be done. Hoffman saw the bid prepared and put in by McMullen. McMullen showed it to him. McMullen brought with him to Portland an estimate upon this work, prepared by Mr. Catt, his engineer, which was all ready to be submitted as a bid. It required no other or additional figures to prepare it as a bid. Mr. Catt's estimate of the cost of manufacturing and laying was $416,638. Mr. McMullen said he regarded this as a perfectly safe bid; that Catt had gone over it thoroughly.

(Record, p. 269): "The reason he did not put this bid in was because they thought they could get more money out of the job. The bid was raised at Hoffman's instance The bid agreed upon between Hoffman and McMullen which Hoffman & Bates was to put in for the plates was $359,378 80; S. F. B. Co.'s bid for the same was $348,781."

(Record, p. 300), Mr. Bush says: "The figures in McMullen's bid for manufacturing and laying were not particularly agreed upon by anybody. It was agreed that it

should be a high bid, and it was simply filled in to make it high. It was not agreed upon to be any particular amount. The bid for the steel plates that was agreed upon, and was to be lower than Hoffman's bid, that was agreed to between Hoffman and McMullen. It was agreed that the San Francisco Bridge Company's bid for the bridges should be lower. The other things did not amount to much."

It appears from the testimony of McMullen (Record, pp. 175-6), that beside the bid that McMullen and Hoffman had jointly agreed upon, for manufacturing and laying the pipe, which was to be presented to the water committee in the name of Hoffman & Bates, another bid had been prepared for the same work which was to be placed before the committee in the name of the San Francisco Bridge Company. That both Hoffman and McMullen saw and knew the contents of this bid; knew it was higher than that put in the name of Hoffman & Bates; that the bid was put in either by McMullen or by his direction, and was accompanied with a certified check for five per cent. of the amount bid, as was required of all bona fide bidders ($25,733.20).

Both Hoffman and McMullen knew that the bid put in or caused to be put in by McMullen, in the name of the San Francisco Bridge Company, was not a competing bid, and neither had any expectation that the contract would be awarded on that bid.

Mr. McMullen says (Record, p. 221), confirming a question put by counsel for defendant: "It is a fact that Mr. Hoffman knew when he put in this bid in the name of Hoffman & Bates that McMullen was to put in one in the name of the San Francisco Bridge Company, and that the bid so put in by him (McM.) would not be a competing bid to the one McMullen and Hoffman had agreed upon."

The reason the bid in the name of the San Francisco Bridge Company was put in is stated by McMullen on

pages 180, 219, 220, 221, 229, in substance to be, because the other bidders and the water committee knew that the San Francisco Bridge Company's representative was in the city and had been figuring on the work, and it was to keep the name of the company before the public as a bidder, and not with any idea of competing for the work bid for, that the bid was put in. In other words, the bid was put in for appearance sake.

The water committee had no knowledge, at the time the bids were opened, that Hoffman and McMullen were bidding jointly on the manufacturing and laying of the pipe, or upon any part of the work, but all bids were supposed to be ***bona fide***, and were so considered and treated by the committee.

Isaac Smith, engineer of the water committee, says (Record, p. 240), he had no knowledge or information whatever at the time the bids were received, on the 1st of March, 1893, of any agreement of Hoffman and McMullen as to their interest in the bid; that he had no means of knowing that the bid of the San Francisco Bridge Company, by John McMullen, was ~~not~~ put in for any purpose than in good faith; had no knowledge whatever beyond the written bid which was submitted to the committee; had no conversation or understanding with any contractor. In response to the question: "How was that bid (San Francisco Bridge Company's) regarded by the committee as to other bids that were presented there being presented in good faith?" Colonel Smith answers: "They were all accepted as presented in good faith. No exception was made to any bid at all, and the contract was let to the lowest bidder."

Mr. Henry Failing was chairman of the water committee, and he says (Record, p. 387) he had no knowledge or information at the time these bids were opened or prior thereto that Mr. Hoffman and Mr. McMullen were united

in this purpose to bid on this work; had no knowledge on the subject; never saw McMullen to know him until today, although thinks he may have seen his face. This question is put to Mr. Failing (Record, p. 387):

Q. The testimony in this case shows that there was before the committee a bid of Hoffman & Bates for manufacturing and laying the pipe of some $465,000, and something over that; and another bid submitted by the San Francisco Bridge Company for $514,000 and some odd dollars; and so there was also evidence that there were some five or six other bids; I will ask you if at that time you had any knowledge that the bid of the San Francisco Bridge Company, signed by McMullen, was a mere sham, simply put in for the sake of making a show?

A. No, sir.

Q. How was that bid with the others treated as being a bid in good faith?

(Record, p. 388). A. It was treated by the committee in the same way. The bids were referred to the chief engineer for compilation. They were all treated alike.

Mr. Failing says he had no knowledge that there was anything about this bid any different from the others. It must have been accompanied by a certified check or it would have been thrown out. Witness remembers of no bid being rejected on that account.

The foregoing statement represents the facts as they existed on the 1st day of March, 1893. On that day, in pursuance of notice duly given by the water committee, bids were received for the work to be done and material to be furnished, and the various sums to be charged therefor.

Following is a statement of the bids put in by Hoffman & Bates, and by the San Francisco Bridge Company:

(All the bids received by the committee are set out in full in the record, pp. 501, 502, 503, 504, 505, 506.)

Head Works—
San Francisco Br. Co. $16,550
Hoffman & Bates 17,800
Bridges—
San Francisco B. Co. $31,279.07
Hoffman & Bates 33,562.94
Steel Conduit from Headworks to Mt. Tabor—
San Francisco B. Co. $348,781
Hoffman & Bates 359,278
Conduit from Headworks to Mt. Tabor of steel or wrought iron, making and laying the pipe—
Hoffman & Bates $465,722
San Francisco B. Co. 514,664
From Mt. Tabor to City Park, cast-iron pipe line—
San Francisco B. Co. $313,730
Submerged pipe—
San Francisco B. Co. $97,300

When the bids were opened, the bid of Hoffman & Bates was found to be the lowest for manufacturing and laying the pipe from headworks to Mt. Tabor, and the contract was awarded upon that bid.

On the 6th day of March, 1893, and before the contract had been executed by the Water Committee on the part of the city, with Hoffman & Bates, the following paper was executed by Hoffman & McMullen (omitting the formal parts): "Whereas, said Hoffman & Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the Water Committee of the City of Portland for doing such work, the contract having been awarded to the said Hoffman & Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said

contract equally. Each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom.

"And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike."

On the 10th day of March, 1893, a contract was entered into between the Water Committee on the part of the City of Portland and Lee Hoffman in the name of Hoffman & Bates, for manufacturing and laying steel pipe in pursuance of the bid presented to the committee in the name of Hoffman & Bates. The substance of this contract is stated in a stipulation signed by counsel for the parties found on pp. 117 to 122 both included.

Shortly after this contract was signed, the contractors sublet the work of manufacturing the pipe to Wolff, Zwicker & Buehner, and for delivering the same when manufactured, to Cook & Kiernan, leaving the remainder of the work to be done directly by the contractors. It appears from the testimony in the case that it was agreed between Hoffman & McMullen (McMullen's testimony, R., p. 167) that the business to be done in Portland or in Oregon would be attended to by Mr. Hoffman, and that any outside business that was to be transacted in the interest of the partnership would be attended to by the San Francisco Bridge Company at the direction of McMullen. Mr. McMullen (R., p. 165) says that he carried out all that the contract, Exhibit No. 1, implies, and at page 166 he says that he furnished in money or plant between $2,500 and $3,000. Mr. McMullen also testifies (pp. 165 to 170, R.) to the effect that he and Hoffman consulted together and

corresponded a good deal about the details of the business, and that McMullen did many things required to carry on the work. He also states that some time in 1893 Mr. Hoffman refused or desisted from making any demands upon him in connection with anything for the job, the particulars of which will more clearly appear from the letters, extracts from which will be found below, and that in December, 1894, McMullen demanded that Mr. Hoffman show him the books relating to the job, and Hoffman refused to exhibit them, or to allow McMullen access to them, and that he had demanded from Hoffman a statement of the amount of money received and disbursed in the execution of the contract, and this Hoffman declined to furnish. It should be stated here for the purpose of informing the court what services Mr. McMullen rendered which he regarded as having been done in carrying out the contract, Exhibit No. 1 (R., pp. 185, 186). The following questions and answers to and by McMullen will serve this purpose (R., pp. 185, 186):

Q. I will ask you to state if the work that you did on your part in carrying out this work, did not consist in consulting Wolff & Zwicker, and Risdon and others, about the best way to arrange your plant, and have the business carried on—excavating the ground, laying the pipe, etc.?

A. I did considerable of that character of work.

Q. Was that not chiefly what you did?

A. No.

Q. What was your chief employment?

A. "*I think the principal thing we did, or one of the principal things*, which every contractor will recognize as the principal thing, *was to get the job.*" Mr. McMullen refers to this subject in the same spirit at page 193, R. On p. 225, R., he further states what services were performed by himself and his engineers in anticipation of the

contract, Exhibit No. 2, and both before and after Nos. 1 and 2 had been executed.

Mr. Hoffman took actual charge of the work on the ground, and acted as the general manager of the business, and with the exception of a working plant furnished by the San Francisco Bridge Company, sent from Seattle, Wash., and the purchase of certain shears for trimming iron pipes, and some other articles, claimed by McMullen to be of the aggregate value of $2,500 to $3,000 (but found by the court below to be $2,316.89), Mr. Hoffman furnished all the money required to carry on the work, over and above what was paid by the Water Committee upon estimates upon the work as it progressed. The sum so advanced by Hoffman was claimed by him to be $10,000, besides the plant he had furnished. Mr. Hoffman made frequent calls upon Mr. McMullen to put up his share of the money to carry on the work, but Mr. McMullen never put in a dollar other than the $2,316.89 above mentioned. The condition of the financial affairs of the contractors will be shown by quotations from letters found in the record, hereafter to be made. (R., 576-7.) ***Hoffman writes McMullen (July 14, 1893):*** "Now, Mac, I have put into this work just $10,000 outside of my tools and outfit, and by the 1st of the month we will have to pay our payrolls, rivets and other bills, all told amounting to at least 4 or 5 thousand dollars more. We have now on the way trestles and valves, iron for bends, etc., which will all have to be paid before we get another estimate. We have got an estimate of $5,000 all told, for pipe laid and trenching; of this amount, $1,900 for trenching. By the time we pay W. & Z. and the hauling, we will only have $3,500 to pay bills with. Now, Mac, I don't feel like carrying this work alone, and as far as borrowing money here on my note, I don't think it could be done; you can't borrow here at all. I am in the same boat you are in. I have got money coming to me, but cannot get it. I am not finding fault with your part of ***the work of getting the contract***, but you must understand that we ***did some work*** and have been

working hard ever since, and am willing to do my part, but cannot afford to do it all; therefore, I must ask you to put in your half of what it takes to run this work. I have started a separate bank account. Hoffman & Bates put in $10,000, and I have not changed my mind as to the amount it will take to carry this work ($20,000) on in good shape, and I still think we are going to make good money out of this contract, but it requires a great deal of watching."

On June 9, 1893, Hoffman writes McMullen, (R., p. 574): "About money matters: I do not care to borrow any money, as I have my money all provided for; anyway, I doubt very much if we could raise any money on notes until the scare blows over a little. I think it will require about $20,000 to carry this work along." Again *on July 31, 1893, Hoffman writes McMullen (R., p. 209)*: . . . "Now, Mac, I want to tell you once more about money matters up here. I have now put into this thing $15,000 in cash, and tomorrow there will not be a dollar left if we pay our bills, as we always have done heretofore. Now, there is no use of your repeating the proposition to borrow money up here, as your bridge stock and all the collateral I have got, with our notes attached, would not borrow $20,000, nor would I undertake to raise $5,000 here now, nor could we have done so within the last forty days. It is a good deal for you to ask of me, to take this work and run it and furnish all the money, and not do anything else. You are taking work all over the country, putting your money into other work, and I cannot do anything but sit here and manage this job. The Water Committee have not sold their bonds, and if they should fail to sell them, I would have not less than $20,000 to pay for work performed this month. Now, Mac, I am willing and ready to live up to my agreement in this contract, and you must do the same. I don't feel as if I was treated right in this matter. We went into this thing together; you agreed to put up your part of the money, and I agreed to put up my portion, and arranged for it. If you will put in $8,000 cash, in addition to the plant furnished, I will try and carry the work along, but this amount I must have not later than the 5th, as I must use part of my money in

other places by that time. Please let me hear from you on receipt of this."

This letter McMullen answers on the 3d of August, 1893 (R., p. 555): "We note yours of July 31. It is not possible for me to make the remittance you demand. Were it, you would not have to demand it. It is possible that I may be able to send you $5,000 next week; this, however, will depend upon whether we succeed in making certain collections. I can only tell you that I will do my utmost to furnish some funds to help handle that job, and for what money and time you put into the job more than I do, I trust I shall be able to make you a satisfactory compensation. I think you are too sensitive about paying everything when it is due; no one else does that these times. I will tell you what I do in my business. When I have money, I pay, and when I do not have money, I tell the people so, and let them wait, and people with ten times the money and resources that I have treat me in the same way. Our labor is the only thing we strain a point to meet promptly.

"Had I been running that job, everything I bought for it I should have agreed to have paid when I received my estimate on it—when it went into the work. A firm of your credit could readily have done this. This is what we do invariably. If, as you intimate, the city should not pay, it seems to me that would be sufficient reason for your not paying, and that you ought not to be worried on that score. It is hardly fair for you to intimate that I asked or expected you to furnish all the money, and do nothing to run that job, after I have explained to you that it was because I was utterly unable to send you any money at this time. . . . I realize that it is not the explanations that you want; that it is money; and I will try and see what I can do. *Meantime, stand them off.*"

McMullen says, under date of July 22d (R., p. 552-3): "Now, Lee, with regard to money: I recognize that it is incumbent upon me to put up half of the money to run this job with, and I stand ready to do anything that it is possible for me to do, but for the last sixty days I have had all I could do to get along, and it does not look a bit better for the next sixty

days to come; after that time we will begin to get in some money. I think we ought to be able to raise a loan in Portland on joint account. I am not only willing to put up the bridge company's note for it, but I am willing to deposit as collateral with said note 14,032 out of a total of 25,000 shares of the capital stock of the company. A fair valuation of the company's assets, over and above its liabilities, shows it to be worth over $375,000. This would make this stock worth $15.00 per share, or a total of $210,480. Don't you think it would be better to borrow the money on joint account there, so as to use your credit and ours, too; and instead of borrowing $10,000, let us go in together and borrow $20,000 or $30,000, or whatever sum is needed? Open a bank account. We certainly ought to get money in Portland, Lee; that is the proper place, that is where the work is. I am willing to give my note and pledge my stock in the company with you and borrow the money from an individual—some capitalist, you should know some one—if you prefer. I am willing to do anything that I can do, and if it were not for this unlooked-for financial stringency, I could probably have sent you the money from here; but, as I have explained to you in my former letters, you know how I have been crowded on account of this stringency." See letters of McMullen to Hoffman, June 6, 1893, R., p. 548; June 15, 1893, R., p. 549; July 6, 1893, R., pp. 550-551; August 4, 1893, R., pp. 556-7-8.

On September 11, 1893 (R., p. 579), Hoffman wrote McMullen: "The water-works contract is very much mixed up. Last Thursday the committee held a meeting and called me in and told me they had no money to pay me on the 20th of this month, and told me they did not know if they could sell any bonds at all or not, and I could keep on or stop, just as I choosed to do. I insisted that it was for them to say if I should go ahead or not, as they had a right to stop the contract, but I did not, as it would involve me with my sub-contractors, but they would not tell me to stop, so I had to keep on. Our estimate is $66,000, and they have $40,000 that they are going to divide equally among all the contractors, so we will get about $20,000, and, after paying Wolff & Zwicker and Cook &

Kiernan their *pro ratio*, we will have about $9,000 left to pay about $22,500 pay-roll, section men included; besides iron gates and supplies besides, this month. Now, Mac, I am compelled to insist that you raise your proportion of this money, as I will absolutely not carry this work any longer this way. You will either have to put up your share of the money or let go the contract, as you agreed to do. I have held off as long as I could, with the hope that I could swing it alone, but I cannot do it any longer. I don't want you to think that I am taking advantage of hard luck you are in, but you can see the necessity of having money. If you will furnish $10,000 by the 20th, I will carry on the contract the same way I did before; but this amount I must insist on your furnishing, or you must let go, and I will get some one in that will furnish part of the money. I still think we will make some money. We are not going to make very much, but we will make some if we don't have too many leaks after we get the water turned on. Now, Mac, I don't want you to think that I want to take advantage of you, because I don't, and if it was you that was doing this work and I could not do my share, I would not ask you to do it for me. If I could do this alone, I would; but I absolutely can't do it. Please let me hear from you at once, as I must do something with this work before pay-day."

Mr. McMullen's reply to this letter is dated September 14, 1893 (*R., pp. 558-9-60*). The letter advises Mr. Hoffman of various methods by which he thinks Hoffman could provide money; says he can put up none himself; denies he ever agreed to let go the contract.

On the 16th of September, 1893 (*R., p. 580*), ***Hoffman writes McMullen:*** "Yours of the 14th at hand and contents noted. Now, Mac, there is no use for you to tell me how to do business. I have done business here for a number of years to suit me, and shall keep on if possible. It is all very well to tell me what to do if you are in S. F., but I am here, and know just what is wanted. Now, I want to tell you, once for all, that unless you put up your share of the money, namely, $10,000, by the 20th of this month, I shall not recognize you in the contract after that

date, and shall make such arrangements as I see fit. If the San Francisco Fridge Company has got the credit you claim it has, and I have no doubt but what it has just got what you say it has, San Francisco is the place for them to raise money to carry on their portion of this work. You seem to raise money enough to carry on the Spokane and Yakima work, but you can do nothing for this. Now, there is no use of our talking this matter over any further. I have told you what I want you to do. If you want to take this work and run it, you can do so. I will put up my portion of the money. But I draw the line on that. Hoping to get your share of the money by the time specified, I am, yours very truly."

Under date of September 18, 1993 (R., pp. 560-561-562), Mr. McMullen replies to Mr. Hoffman's letter of the 16th, in which he suggests how the business ought to have been carried on, how and when payments should have been made, and says, p. 561: "I hardly expected such a proposition from you, Lee, that you would not recognize me in the contract if I did not do thus and so. You must understand that nothing you can do will change my rights in the premises, and if you attempt anything of the kind, you will only injure yourself. If I were in a 'kicking' mood, and wanted to find fault, I might have as much reason, with some things that you have done in connection with that work, as you have to upbraid me for my shortcomings; but I have no desire to recriminate. I trust that on more mature reflection, and with a better outlook on the financial horizon, you will see the folly of the proposition that you put forth in your letter. I assure you, Lee, that you will have no occasion, when you get through, to have any misunderstanding or row with me, unless you persist in making one; if you do, I shall have to accept the situation."

The testimony of Henry Failing, president of the Water Committee (R., pp. 381, 382, 383, 384, 385, 386, 387, 388), and of Frank T. Dodge, secretary of that committee (R., pp. 406, 407, 408), show the financial conditions of the committee from the 1st to the 20th of September, from which it appears that the committee was without sufficient

money to pay bills which it was known would fall due on the 20th. No sale of bonds had been made from which money for this purpose could be obtained, nor was there any certainty that sales would be made in time, or at any time, to meet payments then to fall due. On the 7th of September, Mr. Hoffman was called before the committee and advised of the situation. It was to this interview and the information derived from it that Mr. Hoffman refers in his letter of the 11th of September, when he calls upon Mr. McMullen for $10,000 by the 20th. On the 20th of September, after three o'clock, a telegram, a message, was received by Mr. Failing, informing him that a block of bonds had been sold, and Mr. Failing advanced the money for the purchasers, so it became available at once to pay the bills then due. The committee had some money on hand which it had decided to divide pro rata among the contractors, and warrants had been made out for the amounts to which each would have been entitled in the distribution of that fund; but fortunately, just before they were delivered, news was received of the sale of the bonds, and these warrants were destroyed and others made out for the full amounts due. After that date no difficulty was experienced in selling the bonds; all bills were promptly met. Mr. Hoffman regarded this action of Mr. McMullen in refusing to comply with his request to put up his proportion of the money upon the terms suggested as a dissolution of any partnership which might have existed between them, and from that time forward all correspondence ceased.

Hoffman proceeded with the work and completed it, so that the water was turned in full head on or about January 1, 1895. Under the contract with the city, Exhibit No. 2, the contractor guaranteed the pipe to stand for six months, and could not be finally delivered to the city until after a test for that time. Payments were made to Hoff-

man upon estimates made by the city's engineer as the work progressed, to the amount of 90 per cent., 10 per cent. being retained by the city, or the Water Committee, to be paid when the work was finally completed and turned over. Some extra work was done not embraced in the contract, and some work claimed by Hoffman to be extra work, and for which he claimed extra compensation, was denied by the committee to be extra, but it claimed that the work was within the requirements of the contract. Some money had been paid to Hoffman for the extra work admitted to be such, and some money was admitted by the committee to be due for such extra work.

The record shows that when the work was completed the 10 per cent. retained was $50,982.52, and 10 per cent. retained on account of extra work was $2,263.43. That there were claims made by Hoffman for what he claimed was extra work, but which the committee claimed was within the terms of the contract, amounting to $16,961.25, and was therefore disallowed and unsettled. Hoffman had exclusive charge of the pipe line after the water was turned in, and made all repairs and stopped all leaks, McMullen having nothing to do with the matter. Under this contract with the city, the work could not be finally turned over to the city before the 1st day of July, 1895, the water having been turned in on the 1st day of January, of that year, and the 10 per cent. retained by the committee could not be paid over before that time, and it was impossible for the contract to be completed until the line was turned over and the money paid. Mr. McMullen having been denied access to the books relating to this work in December, 1894, on the 19th day of April, 1895 filed his bill in this cause, alleging substantially the following matter:

That prior to the 6th day of March, 1893, the City of Portland, acting through its Water Committee, published advertisements, inviting bids for the construction of a

system of water-works for said city, or for certain portions thereof, for conveying water from Bull Run river to the City of Portland, for the use of the city.

That before the time for receiving such bids arrived, McMullen and Hoffman agreed that ***they would jointly*** endeavor to obtain the contract for the same or some part thereof, ***and that in their joint interest*** a bid should be put in for the construction of said water-works or of some portion thereof, and that, in case they were successful, ***they would share equally*** in such contract as resulted from their bid; that ***pursuant*** to said ***agreement between Hoffman & McMullen*** and in their joint interest a bid was put in by Hoffman in the name of Hoffman & Bates (that being the name under which Hoffman was doing business) for the manufacture and laying of steel pipe from the head works of said system to Mount Tabor, which bid was found to be the lowest bid for said work, and Hoffman was declared to be the successful bidder and entitled to a contract with the City of Portland therefor; and thereupon, in evidence of the interest had by Hoffman & McMullen in said bid and the contract with the Water Committee, to be entered into thereon and the work to be done thereunder, on the 6th day of March Hoffman & McMullen entered into a certain written agreement that they would share equally in such contract as should be entered into between Hoffman & Bates and the City of Portland touching the work covered by said bid. Each of them, Hoffman & McMullen, to furnish and pay one-half the expenses of executing said contract, and each to receive one-half the profits, or bear and pay one-half the losses which should result therefrom; and further, that in case either party should get a contract for doing or should do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses of said contract or work should be shared and borne by Hoffman and McMullen equally.

That on the 10th of March, 1893, a contract was entered into between the city and Hoffman & Bates, for the joint interest of Hoffman & McMullen, in compliance with the said bid of Hoffman, upon which the contract was awarded, wherein the city agreed to pay for the work specified to be performed, and among other rights reserved by the city it was provided that the said Hoffman should guarantee the said city against all loss, cost or damage from breaks or leaks for a period of six months after the water should have been running full pressure through the whole length of said pipe; that it was provided that monthly estimates should be made of the work done, and payments therefor, less 10 per cent. reserved by the city, should be made on the 20th day of the following month, and the balance within 20 days after the completion and acceptance by the Water Committee.

That Hoffman & McMullen proceeded with the work and completed the same on or about January 1, 1895, and that the city accepted the same, except as provided in said contract for the maintenance thereof for six months.

That McMullen contributed valuable services personally, and of his employes and servants, and contributed money and property to the amount and value of $2,414.46, and has always been ready and willing to render all services required of him, in the conduct and management of said business. That he has performed services, advanced money and provided equipments, the amount of which he cannot state.

That Hoffman & McMullen did some extra work, supplemental to and connected with said contract, for which Hoffman has been paid in part.

That when the contract between Hoffman & McMullen was entered into it was agreed that Hoffman should superintend the work to be done in Oregon, employ men, purchase supplies and receive pay from the city. That

Hoffman performed this work and purchased supplies, etc., except a certain hydraulic punch and shears purchased by McMullen.

That Hoffman had general management and control of the work, and disbursed all money, and kept books showing a full account of the business.

McMullen was all the time a resident of San Francisco, Cal., and only occasionally visited Portland, and casually inspected the work, had no oversight of the work as it was done, and kept no books of account touching the same.

That about December 14, 1894, McMullen applied to Hoffman for leave to examine the books, in which accounts of said contracts and the work pertaining thereto were kept, but Hoffman refused to allow him to see the books.

That Hoffman has received on account of said contract and extra work in connection therewith, and with said pipe line, $35,000 over and above all expenditures made or incurred.

That all the money received by Hoffman has been appropriated to his own use, and he refuses to render McMullen any account thereof.

That the profits of said venture are $80,000, and that the assets of the copartnership, besides the money $35,000 and the 10 per cent. retained by the city, consist of plant, tools and other personal property in Oregon, valued at $5,000 or thereabouts.

The bill closes with the following allegation and prayer:

Inasmuch, therefore, as the defendant has denied to your orator all his rights as a partner in the contract entered into between them, as above set forth, and the work done thereunder, as well as the other work done for the city of Portland, and has refused to give your orator any information touching said contract or said work, or to allow your orator to have access to the books or records having reference to said work, and is withholding from your orator moneys paid to him by the City of Portland, and which should be now paid over to your orator under the

contract between him and the defendant above set forth, it is necessary that there should be a dissolution of the copartnership existing between the defendant and your orator in regard to said work, and inasmuch as some portion of said work is yet to be done, it is necessary that a receiver should be appointed to take charge of and to execute and complete the same under the orders and direction of this court, so as to earn and be entitled to receive the moneys now withheld by the City of Portland on account of the work done under the contract between the defendant and said city, and to draw and receive from said city the moneys now withheld, and hold and disburse the same under the orders of this court, in order that the affairs of the partnership may be fully administered and wound up, and loss may be averted from both the defendant and your orator.

To the end, therefore, that the defendant may, if he can, show why your orator should not have the relief hereby sought, your orator prays that he may be required to make full, true, direct and particular answer and discovery to all and singular the allegations and matters set forth in this bill of complaint, but not under oath, an answer under oath being expressly waived; and that a receiver may be appointed to take charge of the records, books, papers and all other goods and effects of said partnership, and to preserve and dispose of the same under the direction of this court, and also to take charge of and perform all the uncompleted work under said contract with the City of Portland aforesaid; to-wit, the keeping of the conduit pipe, mentioned in said contract, in repair for so much of the period of six months from the acceptance of the work by said Water Committee as may yet have to run, and to do every act and thing necessary to earn and be entitled to receive from said City of Portland the 10 per cent. of the contract price of said work still unpaid, and that said receiver thereupon be authorized and directed to draw and receive from said city and through said Water Committee all moneys owing from said city in respect of the work done under said contract, and as well any and all other moneys owing from said city for work done outside of said contract, in order to bring Bull Run water to said

city, and that he may make sale of all tools, equipment and other personal property belonging to the partnership and used in said work, and hold the proceeds thereof, and all other moneys coming into his hands, subject to the final disposition of this court; that the defendant may be required to deposit and leave with the receiver during the pendency of this suit all books of account, papers and records he may have in his possession, withholding none of them in any wise bearing upon said work, or the moneys paid or owing for the same, said books, papers and records to be, at all seasonable times, open to the inspection of your orator, his agents and legal counsel, with leave to take copies of the same; that the defendant may be enjoined and restrained during the pendency of this suit from making sale or other disposition of the tools, equipments or other personal property belonging to said partnership, and from receiving from the City of Portland the moneys by it withheld on account of the contract entered into between the defendant and the city, and the work done thereunder, as well as any moneys which may be owing for other work done to bring Bull Run water to the City of Portland, or any portion of any such moneys, and that he may be in like manner enjoined and restrained from making any transfer or assignment or other disposition of said moneys, or any portion thereof, or any claim or right he may have therein; that an account may be taken and stated between the defendant and your orator of the dealings and transactions of the partnership, and after making to the defendant due allowance for such service as he has rendered and property or money he has advanced for the work performed by himself and your orator, as above set forth, and making your orator due allowance for such services as he has rendered and property or money he has advanced for said work, the amount of profit realized on said work and the amount owing to your orator on account thereof may be ascertained and determined, and paid over to him, and that thereupon the partnership existing between the defendant and your orator may be dissolved; and that your orator may recover from the defendant his costs of this suit, and may have such further or other relief as may be in keeping with equity and good conscience. Then follows a prayer for an injunction in the usual form.

A restraining order was issued substantially in compliance with the prayer of the bill, but the court refused to appoint a receiver.

Lee Hoffman, the original defendant, answering the bill of complaint, admits that before the time named for receiving bids had arrived, it was agreed by and between McMullen and himself that they would endeavor to obtain some part of the contract for bringing said Bull Run water to Portland, but denies that they at any time agreed that they would jointly endeavor to obtain such contract, but on the contrary it was agreed at said time that they should not act jointly but severally, the defendant acting in the name of Hoffman & Bates, and the complainant acting in the name of the "San Francisco Bridge Co.," a corporation organized and existing under the laws of California.

Denies that it was agreed that joint bids should be put in for the construction of said water works or portions thereof, but alleges the fact to be that it was mutually and secretly agreed between them, before the bids were filed with the water committee, that complainant should make and file several bids for portions of said work in the name of said San Francisco Bridge Co., and defendant should file a like number of bids for the same portions of said work with said committee, in the name of Hoffman & Bates, and that said bids should be so as not to compete with each other, but so as to avoid it.

That it was further agreed that for that purpose and to more surely effectuate the object of getting a contract for said work at as high a figure as possible, and for the purpose of enhancing the profits of complainant and defendant, both complainant and defendant, before said bids were filed, should examine the same and know the contents thereof, and that, pursuant to said understanding, the complainant did submit to the defendant for his examination and approval the bids which he proposed to

file with said committee. . . And in like manner the defendant submitted to complainant for his approval the bids which he proposed to file with said committee, and defendant disapproved complainant's bid and required that it be raised about $98,000 above and more than that complainant proposed and intended and was about to bid for said work, which was done; and complainant disapproved of defendant's bid, and required that it be reduced about $13,000 below what defendant proposed and intended to bid for said work. . . which was done. And the said bids containing the amounts secretly agreed upon by said parties were then filed with said water committee. And the complainant and defendant mutually agreed to share the profits and losses in the execution and performance of said contract, and for greater certainty defendant asks leave to refer to said bids on the trial. That for the purpose of enhancing the profits of plaintiff and defendant it was further secretly agreed and understood between them, and they secretly combined and acted together for the purpose of apparently competing for said work and furnishing said material, but not in fact to do so, and for the purpose of advancing the price of said work and materials to the City of Portland over and above what it would otherwise have been required to pay for the same work and materials, and of getting the contract at such advanced figures. All of which were, in fact, accomplished by the acceptance of the water committee of the bid made by Hoffman & Bates. (Rec., p. 30.)

The answer further avers, that in inviting bids for said work and material, the same was divided into distinct classes by the committee, and bidders were required to submit bids stating the amount for which he would perform the particular work described in the invitation to bid, and the bid. That in preparing bids for the materials and work afterward awarded to the defendant . . com-

plainant and defendant agreed and combined together to obtain the highest possible price from the city for the same, and so arranged their respective bids for the various kinds of work and material required, as that they should not operate as competing bids, although appearing to said committee to be so.

The defendant bid in the name of Hoffman & Bates for manufacturing and laying the pipe, $465,667. On *furnishing steel plates for pipes*, $359,278.80. On *bridges*, $33,562,94. On *headworks*, $17,800.

The complainant bid in the name of the San Francisco Bridge Co., on manufacturing and laying pipes, $514,664; on *steel plates*, $348,781; on bridges, $31,279.07; on *headworks*, $16,550; said several items were arranged as stated by and between the complainant and defendant, and it was understood between them and a part of the scheme by which bidding was carried on, that in case the bid of Hoffman & Bates, for manufacturing and laying the pipe, should be the lowest and should be accepted by the city, and in case the bid for the San Francisco Bridge Co. for furnishing steel plates for pipes should be the lowest bid, and should be accepted by the city, and the bid for the same work by Hoffman & Bates should be the next lowest, said complainant would decline to accept said work and by that means induce the city to accept the higher bid of the defendant, and the same course was to be pursued with all other portions of said work upon which both said parties bid.

That one of the conditions attached to said bidding by the committee was that each bid should be accompanied by a certified check equal to 5 per cent. of the amount of the bid.

That as soon as the bid of Hoffman & Bates was accepted by the city, the contract existing between complainant and defendant was executed, the complainant

and defendant agreeing in writing under their hands and seals in effect thus (Rec., pp. 43-4): ***Whereas***, the said Hoffman & Bates have, with the assistance of said McMullen, the complainant, at a recent bidding, on the manufacturing and laying steel pipe from Mount Tabor to the headwork of the Bull Run water system for Portland, submitted the lowest bid for said work, and expects to enter into a contract with said water committee of the City of Portland for doing such work, the contract having been awarded to Hoffman & Bates on said bid: It is hereby agreed in and by said writing, among other things, that said Hoffman, the defendant, and said McMullen, the complainant, shall and will share in said contract (with the said water committee of the City of Portland) equally, each to furnish and pay one-half of the expenses of executing the same, each to receive one-half of the profits, or bear and pay one-half the losses which shall result therefrom. This contract is set out in full in the transcript at R., p. 16.

The answer alleges that the said bids by the San Francisco Bridge Co. and by defendant in the name of Hoffman & Bates were in the joint interest of complainant and defendant, but denies that one single bid was in their joint interest.

Defendant admits that a bid was put in, in pursuance of the agreement in this answer stated, in the joint interest of complainant and defendant in the name of Hoffman & Bates for the manufacture and laying of steel pipe from Mount Tabor to the headworks at Bull Run, which bid was found to be the lowest for said work, which is the bid above referred to. And admits that the defendant was declared to be the successful bidder.

Alleges that the contract dated the 6th day of March, 1893, between McMullen and Hoffman, hereinbefore referred to, was a part of and made to aid in carrying out

the unlawful combination and confederacy entered into between complainant and defendant hereinbefore more particularly stated and alleged.

Admits that the contract in the complaint mentioned, between the water committee and Hoffman & Bates, dated the 10th day of March, 1893, was executed as alleged.

Denies that upon the execution of said contract, complainant and defendant proceeded with the performance of the work therein contemplated, or on or about the 1st day of January, 1895, or at any other time, completed the same, or any part thereof, or made delivery thereof to the City of Portland; but alleges the fact to be, that defendant alone proceeded with said work and completed the same at the time stated, and turned the same over to the City of Portland; but admits that the same was accepted by the city, subject to the obligations imposed by the said contract, as to maintenance of said pipe, repairs on the same, and damages for leaks and breaks, for six months after the same was accepted by the city, and admits that on said day, the city turned water under full pressure into said pipe, the whole length thereof, and it has since been running in it.

Denies that complainant contributed services of either himself or his employes, toward the execution of said work, or that he contributed money to the amount of $2,414.46 or any other amount. Denies that complainant has been ready or willing to render, or has rendered, any services whatever which might be required in the prosecution of said work.

But, on the contrary, defendant alleges that as soon as the written agreement between complainant and defendant was executed, complainant left the State of Oregon, and thereafter neglected, failed and refused to render any aid or to assist the defendant in any way whatever, in carrying out said contract with the City of Portland.

That in the first place the defendant was required to give to the City of Portland a bond with sureties for a very large amount, to wit, $140,000, for the due performance of said work, and the defendant requested the complainant to furnish a portion of the sureties on said bond, but complainant refused to do so or to aid the defendant in any manner to procure said sureties.

Avers that a large amount of money was necessary to be raised from time to time in the performance of said contract with said water committee, and defendant was without the necessary means and resources to procure the same.

That he continued to apprise the complainant from time to time, up to about the 16th day of September, 1893, of his circumstances, and condition financially, and requested the complainant to furnish one-half of the money actually necessary to the successful prosecution of said work, and the performance of said contract, but the complainant positively declined and refused to furnish any money whatever to aid in the prosecution of said work, or the performance of said contract, claiming he had no money to put into the business.

That by reason of the failure of the complainant to perform his part of the said alleged agreement of partnership, the defendant, on the 16th day of September, 1893, dissolved the same and notified the complainant of such dissolution, and complainant thereafter assented to said copartnership being dissolved and terminated.

Alleges that complainant not only refused to furnish any security in the said bond required under said bid of Hoffman & Bates, . . and required defendant to furnish the said bond and all the sureties thereon, but refused to furnish his proportionate share of the money required and necessary to carry on the work under said contract, . . but complained of defendant that he would not

and did not refuse to pay supply and other necessary bills of expense incurred in carrying on said work, and recommended that instead of paying such bills, defendant should stand creditors off; declared that defendant was very foolish to try to meet every payment promptly; said "He would stand them off for everything or pay them 50 cents, or whatever he could out of the estimates, and such things as supplies for camps he would not pay for six months, if he did not feel like it," although defendant had been obliged, in securing supplies and labor, to contract for paying for the same at the end of each month, as complainant well knew; yet complainant refusing to put in his share of money to pay these bills, . . desired defendant to disregard his contract and "stand off" the creditors, as aforesaid.

Alleges that on the 16th day of September, 1893, defendant had advanced from his own funds on account of said work, $15,990.

That bills to fall due September 25 amounted to about $22,500.

That on the 11th day of September, 1893, defendant was notified by said committee that it was without funds with which to pay the estimates for the completed work for the month of August, and had no assurance when money for that purpose could be obtained.

That in order to be prepared to meet the payments so to fall due on September 25, defendant, on his own account, by furnishing his own collaterals, secured at considerable loss and sacrifice $14,000, which would not have been necessary or required if complainant had not refused to provide the money he promised and agreed to furnish. That said plant furnished by defendant at Seattle by request of complainant was purchased from the San Francisco Bridge Co., and bills therefor were rendered by said company to Hoffman & Bates, as well as for the said

hydraulic punch and shears in complainant's bill mentioned. And said Hoffman & Bates forwarded and tendered to said San Francisco Bridge Co., at San Francisco, Cal., full and complete payment of the several sums and amounts claimed in said bills. That the San Francisco Bridge Co. refused to accept the money so tendered. That defendant has at all times since said bills were rendered been able and willing to pay the same, and is now ready and willing to pay for said material, punch and shears in full.

Denies that defendant and complainant did other work for bringing Bull Run water to Portland in connection with or supplementary to the work done under said contract between the defendant and the City of Portland.

Admits that defendant has been paid by the city the stipulated amount of *ninety* per cent. of the contract price, as claimed by said complainant, and the other *ten* per cent. as claimed by said committee, is withheld until compliance is made with the guarantee in said contract as to keeping the line of pipe in repair, and saving the city harmless from damage by leaks or breaks for six months from the date of the completion of said contract.

Admits that he has been paid a large part of the cost and value of the other work performed for said committee, but not wholly paid.

Admits that various modifications were made in the work on the contract, but cannot say just what they were.

Admits that it was agreed when the contract was entered into, that defendant was to have and exercise personal supervision over work to be done under the proposed contract; make all purchases, hire all labor, and generally to manage matters connected with the execution of said work; to draw and receive all moneys to be paid for said work, and to disburse the same for account of said work as might be required.

Alleges that it was understood and agreed between complainant and Hoffman that for such services Hoffman was to have and receive and to be paid out of the money to be drawn from said water committee, a reasonable compensation, and that one thousand dollars per month is such reasonable compensation.

Defendant admits that he assumed and exercised personal superintendence of said work and made all purchases except a certain hydraulic punch and shears, but denies that complainant purchased the same, and avers that defendant ordered them and they were paid for by the San Francisco Bridge Co.

Admits that defendant employed all labor and exercised general management within the State of Oregon over all the matters connected with the execution of said work, and received all moneys paid by the City of Portland on account of said work, and disbursed the same as far as there was any occasion for disbursement. Admits he kept full accounts of the whole business, and now has full records thereof.

Admits that during the time said work was being done complainant was a resident of San Francisco, Cal., and was only occasionally in Portland, made only casual inspection of the work as it progressed, but had no oversight of the work as it was done. Don't know whether complainant kept any book of account connected with the work or not.

Does not know whether complainant has any knowledge of work done other than what was included in the contract with the city.

Admits that all of said matters and things are fully set out in the books and records kept by defendant.

Admits that he has now the several monthly estimates rendered him by the engineer of said committee, and denies that the last of said estimates will or does show all the

money earned or paid on said contract or other work done to bring Bull Run water to Portland.

Admits that about the 4th of December, 1894, at the City of Portland, the complainant requested defendant to allow him to inspect the records and books of account and demanded of defendant an accounting of the dealings and transactions of said alleged copartnership.

Admits that, notwithstanding said alleged contract with defendant, touching said work and his pretended rights as an alleged partner therein, defendant then refused and has ever since refused to render any account thereof to complainant, or to allow him to inspect the records or books of account kept by defendant touching said work, or any monthly estimates rendered defendant by the engineer of said committee.

But alleges that he refused to allow such examination, as he then and still believes he might lawfully, properly and justly do for the causes and reasons hereinbefore in this answer stated.

Admits that the city has already paid him in excess of $35,000 or more, over all expenditures or liabilities which defendant has incurred on account of his contract, and admits the same is expected profit on said contract.

Denies that any part of the money so paid by the city to the defendant is due to complainant, and denies that he has converted all or any of said money to his own use.

But admits that he has refused and still refuses to render to complainant any account, or payment thereof, although complainant requested the same.

Admits that on the 4th day of December, 1894, he denied and still denies the assumed and alleged rights of the complainant as a partner in said work, and his alleged rights to an equal or any share of the profits thereof.

Denies that the profits made by the defendant and complainant upon the work done for the City of Portland were

$80,000 or any other sum. Denies that said complainant did any work for the said City of Portland and alleges that from the time said bid of Hoffman & Bates was accepted by the said committee, the complainant refused to aid in any manner in said work or otherwise than to request defendant to go upon the same for a small remnant of a plant then owned by the San Francisco Bridge Co., of no greater value than $1,062.82; and denies that one-half of said sum of $80,000 or any other sum should be paid complainant.

Denies that the assets of said partnership are $5,000 or any sum.

Admits he has on hand part of the plant used in doing said work, but alleges that the same is pretty well worn out and is of little value.

Denies that any receiver should be appointed to take charge of the books, etc., of said pretended partnership, or to take charge of or perform all or any of the uncompleted work under said contract with the City of Portland, namely, the keeping of said conduit mentioned in said contract in repair for so much of the period of six months from the acceptance of said work by said water committee as may yet have to run, or to do any or every act or thing necessary to earn or be entitled to receive from said City of Portland the 10 per cent. of the contract price of said work still unpaid.

Denies that complainant is entitled to or ought to have the relief demanded in said bill of complaint, or any part thereof, or to have any accounting or injunction or receiver herein.

Seventeen exceptions were filed by the plaintiff to the answer for insufficiency and impertinence, four of which were allowed and the remaining thirteen overruled.

The opinion of the court upon the exceptions is set out in the record, p. 58. The plaintiff then filed a general repli-

cation. Testimony was taken and the case was heard upon the merits and a decree was rendered in favor of the plaintiff (R., p. 96). The defendant appealed to the United States circuit court of appeals for the ninth circuit, and that court reversed the decree of the lower court (R., p. 595). Application for rehearing was denied, and the plaintiff thereupon applied to this court for its writ of certiorari, which was allowed, and the case is now here for trial.

ARGUMENT.

The complainant rests his right to recover in this suit upon the ground that himself and Hoffman were joint bidders at the letting of the work described in the bill. That their joint bid was presented to the water committee in the name of Hoffman & Bates, and upon this bid the contract was awarded in the name of Hoffman & Bates, but was, in fact, the joint contract of McMullen and Hoffman. That the contract was in part performed by them jointly and that profit was realized, a portion of which has been paid to Hoffman, and he refuses to pay McMullen his share, and McMullen sues to recover it.

Answering the claim of McMullen, Hoffman denies that himself and McMullen were joint bidders, but avers that they were to and did bid separately and severally, but had a *secret* agreement to be jointly interested in any contract which might be obtained for the construction of the Bull Run water works. Avers that the contract secured by such means was void as against public policy, and that the agreement between himself and McMullen to execute the contract so obtained by them was fraudulent and is also void and cannot have the aid of the court to enforce it. To avoid this contention on the part of Hoffman, McMullen claims that after the contract had been awarded on the bid which is claimed to be fraudulent, and after the alleged

fraud had been completed, McMullen and Hoffman entered into a written agreement to execute the contract so awarded, and to divide the profits between them. That this last agreement is a new and separate transaction wholly disconnected with the fraudulent agreement and acts by which the contract with the city was obtained, and may be enforced, although their own acts in obtaining it were ever so vicious and fraudulent.

Joint Bidders.

In Atchison v. Mallon, 43 N. Y. 147, 151, Judge Folger, speaking for the New York court of appeals, says: "A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed and not secret. The risk, as well as the profit, is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid."

If this statement be accepted as the true rule in cases of joint bidding at public lettings, (and I believe it has been adopted as such by counsel for McMullen in this case (Resp. Brf. C. C. of App., p.19), it is proper next to examine the facts and find, if we can, whether McMullen and Hoffman have brought themselves within it. The answer admits that pursuant to the alleged agreement between McMullen and Hoffman, stated in the bill of complaint, and in their joint interest, a bid was put in by the defendant in the name of Hoffman & Bates for the manufacture and laying of the pipe, which was found to be the lowest bid for said work, and a contract was awarded upon it. Admits that in ***evidence*** of the alleged interest had by McMullen

and Hoffman in the contract to be entered into between the water committee and Hoffman & Bates, on said bid, they executed the writing Plff. Ex. No. 1, but defendant avers that said contract last referred to is the same contract referred to in the former part of said answer and was part of it, and made to aid in carrying out the unlawful combination and confederacy entered into between the parties, in the answer more particularly described. (R., pp. 30, 31). The answer denies that it was agreed between the parties that joint bids should be put in for the construction of said water works or of certain portions thereof, but, on the contrary, avers the fact to be that it was mutually and secretly agreed by and between the parties before the bids were filed with the water committee that the complainant should make and file with said water committee several bids for portions of said work in the name of the San Francisco Bridge Company, and the defendant should, in like manner, make and file several bids with said committee for the same portions of said work in the name of Hoffman & Bates, and that bids should be made so as not to compete with each other, but so as to avoid it. That it was further agreed that for that purpose and to more securely effect the object of getting a contract for said work at as high a figure as possible and for the purpose of enhancing the profits that the bids so prepared should be seen and examined by each of them, and that in pursuance of such understanding McMullen did submit the bids he had prepared to Hoffman for his examination and approval, and in like manner Hoffman submitted to McMullen for his examination and approval the bids he had prepared. That Hoffman disappproved of McMullen's proposed bid for manufacturing and laying pipe, and required it to be raised, and it was, in fact, raised about $98,000 above what McMullen proposed, intended and was about to bid for the work; and that McMullen disapproved of Hoffman's bid

for the same work and required it to be reduced about $13,000, which was done. (R., pp. 29, 30).

The answer further avers that for the purpose of enhancing the profits of the parties it was further secretly agreed by and between McMullen and Hoffman, at said time, and they so secretly combined and acted together for the purpose of apparently competing for said work and furnishing said materials, but, in fact, not to do so. (R., p. 30).

The answer further avers that in preparing bids for the materials and work afterwards awarded to Hoffman & Bates, McMullen and Hoffman agreed and combined together to obtain the highest possible price from the city for the same, and so arranged their respective bids for the various kinds of work and materials required as that they would not operate as competing bids, although appearing to the committee to be so. It must be remembered that no bid whatever was presented to the committee in the name of Hoffman & Bates and the San Francisco Bridge Company or John McMullen as joint bidders, but the answer avers, and the undisputed proof shows, that bids were put in by Hoffman & Bates and by the San Francisco Bridge Company severally and separately as follows:

Hoffman & Bates, manufacturing and laying pipe	$465,667.00
Furnishing plates	359,278.00
Bridges	33,562.94
Headworks	17,800.00
McMullen, in name of San Francisco Bridge Company, manufacturing and laying	$514,664.00
Furnishing plates	348,781.00
Bridges	31,279.07
Headworks	16,550.00

(R., pp. 30, 31).

It will be noticed that the totals of all these bids are:

Hoffman & Bates, $876,307.94; San Francisco Bridge Company, $911,274.07.

The answer further avers that the several items of said bids were arranged by McMullen and Hoffman, and it was understood and agreed between them and a part of the scheme upon which bidding was carried on, that in case the bid of Hoffman & Bates for manufacturing and laying the pipe should be the lowest and should be accepted by the city, and in case the bid of the San Francisco Bridge Company for furnishing the steel plates for pipes, should be the lowest bid and should be accepted by the city, and the bid of Hoffman & Bates should be the next lowest, said McMullen would decline to accept said work, and by said means induce the city to accept the higher bid of Hoffman & Bates; and the same course was to be pursued with all other portions of the work upon which both parties bid.

If these averments of the answer are supported by the evidence the case thus made would not show McMullen and Hoffman to be within the rule laid down in Atchison v. Mallon; and any contract they may have secured or entered into or agreement they may have made upon the basis of such actions as the answer describes would be void as against public policy, and no court would lend its aid to enforce it.

What does the evidence show?

The bids themselves are conclusive evidence that McMullen and Hoffman did not agree to bid jointly for the work to be let, but that they agreed to bid severally, and they did, in fact, bid severally and not jointly. This the bids prove without commentary, and show that if they were, in fact, joint and not several, as they appeared, they were a fraud upon the water committee and other bidders. That there must have been some design in practicing this fraud is evident from the fact that without it the parties

would have prepared bids joint on their face; would have presented but one set and in the name of the real bidders. This would have been the honest course, and that which would have been pursued had there been no other object in view than to deal fairly, openly and honestly with the committee. Hoffman & Bates and the San Francisco Bridge Company would have signed their two names to the bids. That would have been fair, open and true. The course they did pursue was misleading, deceptive, fraudulent and false.

The reason for pursuing the course adopted instead of presenting only one set of bids, signed by both bidders, is fully explained by Mr. Bush, who was engineer of Mr. Hoffman, and prepared the bid for manufacturing and laying the pipe upon which the award was made; was with McMullen and Hoffman and heard their conversation and knows what they agreed to, and is the only living witness, except McMullen, (since Mr. Hoffman's death), of what occurred. Mr. Bush is wholly without interest in the matter. He says in substance (R., p. 266-7) that in the various conversations between Hoffman and McMullen it was agreed they should bid together so as to try to get as much work as possible, and it was decided finally that Hoffman & Bates' bid should be lowest, or lower than the San Francisco Bridge Company's bid for manufacturing and laying of the pipes, and the San Francisco Bridge Company's bid should be lower than Hoffman & Bates for furnishing the plates, so that there might be a chance to combine these two bids on both these two items. That ***each*** would ***bid*** on ***his own account*** and they would share in whatever portions of the work they might be successful in getting; Hoffman & Bates' bid should be lower for the manufacturing and laying and the San Francisco Bridge Company's bid should be lower on the delivery of the plates; that was the day the bids should be opened; that ***combi-***

nation they were making to get as much of the work as possible. By combining Lee Hoffman's bid on the manufacturing and laying with the San Francisco Bridge Company's bid on the delivery of the plates, or if there was no bid between that ***combination***—the Hoffman & Bates' bid on the manufacturing and laying and the San Francisco Bridge Company's bid on the delivery of the plates—that the San Francisco Bridge Company was to try to withdraw their bid on the delivery of the plates so that the whole work should go to Hoffman & Bates.

Again, (R., pp. 275-6), Mr. Bush says the Hoffman & Bates bid for manufacturing and laying was $465,667, and the San Francisco Bridge Company's bid on the plates was $348,781, making the total of the two $814,448. Now it was understood if that was the lowest total that then they were to make an effort to have Hoffman & Bates's bid on the delivery of the plates accepted, and have the San Francisco Bridge Company's bid on the delivery of the plates withdrawn, which would raise the total they were to receive on the delivery of the plates about $10,000. The exact total would be $824,945.80.

This testimony of Mr. Bush shows one of the motives for bidding separately—preparing two sets of bids signed by each firm separately, instead of a single set signed by both, thus necessarily disclosing their joint interest—was that by pursuing the former course they would have a chance to make some ***change*** after the bids were opened; that the bids could be "manipulated in some way" so as to get more money from the city, whereas to have pursued the other course such a scheme would have been impossible. The first was a fraud upon the committee, the last would have been correct and honest. As it was, they said, now we will so arrange these bids that with Hoffman & Bates' low bid on the manufacturing and laying, and his high bid on the delivery of the plates, the total will be so

much less than the San Francisco Bridge Company's high bid on manufacturing and laying and low bid on the delivery of the plates, that we may be able to "manipulate" the bids so as to get Hoffman & Bates' high bid on the plates substituted for the San Francisco Bridge Company's bid on that item.

This disclosed a motive for appearing under false colors before the committee and the public. It is exactly in line with the remark made by Hoffman in his letter to McMullen dated February 11, 1893, (R., 566), in which he says: "This work will be let to the lowest bidder, no matter who it is, so long as he is responsible. *I, of course, think the bids can be manipulated some way that we could work on the commission after they are opened.*"

Another fact in the record which affords a reason why these bids were put in separately and did not appear to be the joint action of the two bidders, is that it was important that the committee should have good reason to believe that the sum named in the bid of Hoffman & Bates was a reasonable one for the work. The San Francisco Bridge Company at a former letting of the work had been the lowest bidder. Here its bid was more than $48,000 higher than the bid of Hoffman & Bates for the same work; and upon every other item bid for it was less; less for the plates; less for the bridges; less for the headworks, the evident intention being to impress the committee that Hoffman & Bates' bid on the manufacturing and laying was very favorable to the city.

Another fact tending strongly to show that the course adopted was intended to deceive and mislead is the explanation McMullen gives as the reason separate bids were put in in the name of the San Francisco Bridge Compapny. From Mr. McMullen's statement it appears that it was known among other bidders and by the water committee that the San Francisco Bridge Company was figuring on

this work, and assumes that a bid or bids would be expected from them, and, so he says, in order to have the public and the committee *believe* that the San Francisco Bridge Company was really a bidder at the letting, the bids which were put in by it, were presented. "It was put in to let other people know that both parties were represented here, as the water committee and the engineers and contractors all knew that both parties were represented here. The higher bid was simply put in to let the name of that firm appear as a bidder, and *we had no interest in it*, and we did not *care* anything about *how much* it was, and by 'we' I mean Mr. Hoffman and myself. *The high bid was put in simply to allow the firm putting it in to be represented at the bidding.*" (R., p. 220). Again, (R., p. 229), McMullen says: "The San Francisco Bridge Company simply put in a bid for the *appearance* of the thing, as I was here, and the company was represented here."

(R., p. 229)—"It was put in simply to *keep* the *company before the public*, as we were known to have figured on it; it *did not represent anything;* it was simply put in to have it high enough that it would not receive any attention." Could an intended fraud have been more effectually practiced? McMullen says that other contractors and engineers and the water committee knew the San Francisco Bridge Company had figured on the work, and says in effect that these people have good reason to expect them to bid, and in order to mislead them the San Francisco Bridge Company put in these false bids, bids "*in which they had no interest*," bids so high that they "*would not receive any consideration*," and yet neither contractor, engineer nor committee had the least knowledge or suspicion that the bids were not put in as other bids, in good faith, and as an honest representation of what the work could be done for in the judgment of the bidder. It must not be forgotten that these bids, which were intended by

McMullen and Hoffman to be mere shams, to make the fraud more effectual and to give color to their apparent integrity, were each accompanied by a certified check, the aggregate amount of which was no less sum than $45,000. All this simply *to get the name of the San Francisco Bridge Company before* the *country* and the *committee* with the appearance of an honest competitor at a public letting, and believed so to be by the public and the committee, but, in fact, a cheat, a fraud, a falsehood, and intended so to be by the parties concerned in presenting them. If it was due to the public, the committee and the San Francisco Bridge Company that it should have appeared as a bidder at that letting, how simple, plain and honest a course was open. All that was necessary was for Hoffman & Bates and the San Francisco Bridge Company to have prepared a set of bids and signed them. "Other contractors," the "engineers" and the committee would then have known in what manner and to what end the two companies had "figured on" the work. The transaction is so far out of the line of the honest, straightforward course which ordinary business judgment would suggest that it is condemned at once by honest men as fraudulent and wicked. The testimony of Mr. Bush shows the motive for the course pursued. McMullen's attempted explanation instead of helping him or them only removes all doubt that the fraud was intentional, and furnishes an apt illustration showing with what consummate skill truth weaves her web about and crushes the rogue who seeks by falsehood to supplant her.

The evidence, then, shows that the averments of the answer above quoted are true.

That while McMullen and Hoffman agreed to be jointly interested in any contract which might be secured from the city, they agreed not to *bid jointly*, but to *bid severally*. Second, that they had a secret agreement that their interests should be joint in any contract which might be

secured with the water committee. That this agreement was not known to the water committee or any of its members, the engineers or to any of the bidders competing at the letting.

This evidence shows that the agreement between Hoffman and McMullen does not bring them within the rule laid down in Atchison v. Mallon and invoked by themselves as the rule by which their rights shall be measured, because:

First—Their co-operation was not honest, but was dishonest, fraudulent and for a fraudulent purpose.

Second—As joint bidders they were not public nor avowed, but were secret, deceptive and false.

Third—Although by their secret combination they were to jointly enjoy the profits, no risk was assumed by the San Francisco Bridge Company. The city had no claim upon that company as a result of a joint bid or of the awarding of the contract, although McMullen says in a letter to Hoffman under date of July 22, 1893, (R., p. 554), the San Francisco Bridge Company has assets of the value of not less than $210,000, of which McMullen owns shares of the value of over $190,000, yet he not only did not bind himself to the city by bidding with Hoffman upon a bid in which he had a half interest and which he knew there was at least a chance of its being the lowest, but he put in a false bid which he knew could not be accepted. Nor did he so much as sign the bond for $140,000 which the city demanded as security for the execution of the contract which was awarded and of which McMullen claims to have been all the time a half owner.

The writing signed by McMullen & Hoffman dated March 6, 1893, not a new agreement.

From the foregoing statement it plainly appears that long prior to the 6th day of March, 1893, McMullen and

Hoffman had agreed to act together in securing contracts from and doing work for the city in the construction of its water works, when bids should be again invited; bids for substantially the same work having been invited and received in 1887, but no contracts were let. For the purpose of impressing this point, which we deem of great importance, upon the mind of the court, attention is again called to the evidence touching it.

The complainant's bill alleges that before the time named in the advertisements within which bids were to be received for the construction of said water works, it was agreed by and between McMullen and Hoffman that they would jointly endeavor to obtain the contract for the same or some part thereof, and that in their joint interest a bid should be put in and that in case they were successful they would share equally in such contract as resulted from their bid. That such a bid in their joint interest was put in, in the name of Hoffman & Bates; that it was the lowest bid, and that bid was entitled to a contract for the work it described; that thereupon in "Evidence of the interest had by Hoffman and McMullen in said bid, and the contract with the water committee to be entered into thereon, ***and the work to be done thereunder***," the written agreement of the 6th of March, 1893, was signed by the parties. McMullen (R., p. 221) in his re-examination by Mr. Cox, in answer to a question as to when the matter of joint action between himself and Hoffman in regard to the water works first came up, said:

"It first came up several years before this job was awarded, when the bids for building the Bull Run pipe line were taken, I think in 1887, after the San Francisco Bridge Company were the lowest bidders. At that letting Mr. Hoffman came to me and congratulated me, and said that we made a bold, good bid, and that he did not think we knew so much about pipe lines, and said he was sorry it was

not going to go through. Think it was Pennoyer that vetoed the bonds. He said: 'When this thing comes up again, Mac, we must go in together and see if we can't get it.' And we frequently talked during the time that intervened between that occasion and December, 1892, when again negotiations were actively commenced, and it was understood the water committee were going to let the contract early in the spring."

Geo. W. Catt, a witness for the plaintiff (R., pp. 150, 151, 152), in his deposition states in substance (p. 151) that from about 1889 to February, 1892, he was vice-president, chief engineer and had general charge and management of all the business of the San Francisco Bridge Company within the states of Oregon, Washington, Idaho and Montana. After February, 1892, was transferred to New York, and had general charge of the business of the San Francisco Bridge Company on the the Atlantic coast. Soon after Mr. Catt had become manager of the business of the San Francisco Bridge Company in the states named, he says, Lee Hoffman, then proprietor and manager of the business conducted in the name of Hoffman & Bates, approached Catt in reference to the San Francisco Bridge Company and Hoffman's firm joining forces for the building of the contemplated "Bull Run" water works for Portland. Had several conversations concerning such a union of the two concerns for this work. In 1891, Catt and Hoffman journeyed together from Spokane to Tacoma via N. P. R. R. Mr. Catt says:

"During this journey Lee Hoffman and I arrived at a ***basis of agreement*** by which the ***San Francisco Bridge Company should unite with Hoffman & Bates in the construction of the Bull Run water works, in case either of us secured from the city of Portland the contract for building said works.*** The ***essential*** point of that ***agreement*** was ***that the work should be executed by us jointly, for the***

joint account of the two companies, and the two companies should share alike in all losses or profits that might result from such contract for building the Bull Run water works. It was a general understanding between us, the details of the agreements being left to be settled when the contract was obtained. This arrangement was often referred to by Lee Hoffman between the time of making of it and the time of my departure for the management of the San Francisco Bridge Company's business on the Atlantic coast. It was also *agreed between Hoffman* and *myself* that I should make such *investigation as I could in reference to the requisite plant, proper tools, etc., for the manufacture of steel water pipe. As a result of this I did make some investigation* during the year 1891 by corresponding with manufactories of tools, etc.; also visited the Albion iron works of Victoria, B. C., which was at that time manufacturing some pipe of this character. *I advised the San Francisco Bridge Company at San Francisco, through Mr. McMullen, of this arrangment with Lee Hoffman, and when the work was advertised for the city of Portland in 1893.* In making my estimates for the work mentioned I addressed some of them to *Mr. J. McMullen* and *Hoffman & Bates jointly*. The agreement was that J. McMullen should collect what information he could at San Francisco, Cal., with the assistance of the engineering force of the San Francisco Bridge Company there concerning the proposed work. He was to take such information with him to Portland, Or., where he would meet with Lee Hoffman, who would have secured such information as he could on the same subject, modified by his more accurate information of the local conditions, and that what information I could secure by investigation in the East would be forwarded to *Lee Hoffman and J. McMullen*, of Portland, Or., and that after they had made a comparison of all informa-

tion collected they should agree upon the amount to be bid for the work jointly."

This testimony alone shows beyond any question that the writing signed by McMullen and Hoffman on the 6th day of March, 1893, and made the basis of this suit, was not a new agreement, made at the time of the execution, but was simply the settlement of the "detail" of a general agreement entered into more than two years before, and in pursuance of which all the work of procuring the contract had been done. This testimony shows beyond controversy that all the work done by either party in securing this contract with the city was in pursuance of and part performance of the agreement between them to act jointly in securing it, and "doing the work for the joint account of the two companies, and the two companies should share alike in all losses and profits that might result from such contract." This deposition (R., p. 153) shows what other work was done in pursuance of this agreement and prior to the execution of plaintiff's Ex. No. 1, to which the attention of the court is respectfully invited.

The testimony of Mr. McMullen is altogether in harmony with Mr. Catt, for he testifies (R., p. 171) in substance that whatever consultations he had with Hoffman relative to procuring the contract from the water committee was with a view to McMullen and Hoffman *performing the work together in case they secured the contract.*

Again, (R., p. 173), the following question was asked McMullen:

Q. Then while you and Mr. Hoffman were working together and preparing the bid, you had no expectation that if awarded to Hoffman & Bates you would be a partner to the execution of the work?

McMullen answered: "Certainly I had expectations, decidedly. All the correspondence for three months prior

to that will *show that it was mutally agreed that we should be partners.*"

On the same page he further says that while Hoffman and himself were figuring together and preparing the bid for manufacturing and laying the pipe they not only expected *to be partners in doing the work, but they had agreed to be.*

(R., p. 174) McMullen says: "It was agreed before the award had been made that we were to be partners. Now after the award was made this paper (Ex. No. 1) *is the identical agreement that we mutually assented to*—it was reduced to writing in Mr. Hoffman's attorney's office, and we both signed it."

Again, (R., pp. 174, 175), when McMullen and Hoffman were figuring upon a bid for manufacturing and laying the pipe for the Bull Run water works we had a *verbal agreement* to be partners, a tacit understanding, as our correspondence will show.

"We *bid for it* with the idea of getting *the contract* and *doing it if we got it.*"

Hoffman and McMullen together *as partners.*

Again, (R., p. 193), McMullen says: "Let me say, it was the same as *that we contributed before the signing* of the agreement and contract which made it successful."

Again, (R., p. 212), McMullen says: "Whatever was done prior to the signing of the partnership agreement, it was in the *same condition as the job* was secured; the submerged pipe in our negotiations with each other was in the same status as this relating to the pipe lines proper."

(R., p. 225) McMullen was asked:

Q. How much time was given by these gentlemen to this work, approximately?

A. All the time from early in January, 1893, to the letting of the contract, and after the letting of the contract

a very large portion of their time and my own time until the job was well under way, at the end of July or August, 1894.

(The parties whose time was employed as stated in the preceding answer of McMullen were, as he claims, Mr. Catt, Mr. Krusi and Mr. Wood, all civil engineers, all in the regular employ of the San Francisco Bridge Company). (R., p. 225).

(R., pp. 185, 186), question to Mr. McMullen: "I will ask you to state if the work you did on your part in carrying out this work did not consist in consulting Wolff & Zwicker and Risdon and others about the best way to arrange your plant, and have the business carried on—excavating the ground and laying the pipe and so forth."

A. "I did considerable of that character of work."

Q. "Was that not chiefly what you did?"

A. "No."

Q. "What was your chief employment?"

A. "Well, I think the principal thing that we did, or one of the principal things which every contractor will recognize as the principal thing, was to get the job."

Mr. McMullen says (R., pp. 229, 230, 231) that he made no charge against Hoffman & Bates for the services of Mr. Catt, whose salary was $5,000 per year, nor of Mr. Krusi, whose salary was $3,600 per year, nor of Mr. Wood, whose salary was $2,100 per year, which were rendered by them, beginning in January, 1893, and continuing four or five months; (two months of this time was before the writing Ex. No. 1 was executed); that the services of these men, as well as his own time and services, were his contribution to the enterprise for which he expected to be *paid out of the profits*, if there were any. (R., p. 231).

From all this evidence but one conclusion can be reached, and that is that McMullen and Hoffman agreed together to build the Portland water works or some portion thereof,

if they could secure contracts or a contract. That their agreement was that they would unite to get the contract and do the work, each paying half the expenses and each to receive half the profits or bear half the losses, as the venture should prove successful or otherwise. The object of the combination was to make profit out of any work they should get. There could be no profit if no contract was secured, and therefore no necessity existed for any steps being taken to preserve the agreement they had entered into, but after they had performed their agreement so far as to secure the contract, and all doubts were removed on that point, and the basis was laid for earning profits, then they reduced the agreement to writing for the purpose of "evidencing the interest" they respectively had in it.

If the allegations of the bill relating to McMullen's interest in the bid, the award and the contract are true, it is very certain that he had no greater or different interest in the contract after Ex. No. 1 was executed than before; and his interest would have been exactly the same if Ex. No. . had never been signed. His right rested upon the agreement entered into between himself and Hoffman long before the contract with the city was awarded or any efforts to secure it were made.

It is not claimed that the writing signed by McMullen and Hoffman granted to or conferred upon McMullen any right or property he did not already own; but he says it was executed for the purpose of "evidencing" a fact which did not appear on the face of the bid, but which existed nevertheless, viz.: The joint interests of Hoffman and McMullen in the contract which had been awarded. McMullen himself does not pretend that the agreement granted him anything he did not already own, but merely recognizes what he had in his own right, a right which the testimony above quoted shows that he claimed to have earned in his efforts to aid and assist in procuring

the contract. Having entered into an agreement to perform as much of the work of constructing the Portland water system as they could secure contracts for, the first thing for them to do was to get the contracts. The work was to be let upon sealed bids. The public was invited to bid and was notified that the lowest bidder would get the contract. This was known to McMullen and Hoffman. They knew that the work was to be let in distinct divisions, and that others than themselves would bid; that there would be competition. Knowing these facts they prepared bids in which they secretly agreed to be jointly interested.

Hunter v. Nolf, 71 Pa. St. 282.

Sharswood, J. (p. 284): "It is an undisputed fact that Hunter and Nolf, both being applicants for the office of assistant assessor of the United States, it was agreed between them that if Nolf should withdraw and Hunter receive the appointment, they would jointly perform the duties, and equally divide the receipts. It is undisputed law that such a contract is illegal, against public policy, and cannot be enforced." It was claimed by the plaintiff that after the original contract was entered into, under which the appointment was secured by Hunter, and after it was secured, a new contract was made between himself and Hunter, upon which the present action is based, and that the new contract was not tainted with the illegality which rendered the original void. Upon the point the court says: "If there was a new contract it was certainly precisely the same in its terms as that made before the appointment. Nolf himself was examined as a witness, and throughout his testimony insisted on the original contract. 'We had,' said he, 'a regular contract. Our regular contract was this: "He offered me, if I would help to do the regular business, he would give me half; this was spoken of before and after he had the appoint-

ment.'' Does it in the least degree shake this testimony that Nolf testified, 'Joseph, in the month of October, 1866, employed me to make assessments,' or that Captain Stollzenback testified that Hunter told him 'he had employed Nolf to assist in making assessments?' Even if there had been an express contract on entirely different terms than those agreed upon before, it ought to be viewed with a considerable degree of suspicion as an attempt to evade a sound and salutary rule of public policy, but here there is no pretense of any other or different contract. The payments made under it, as it clearly appears, were in accordance with its terms—not a *quantum meruit*, but one-half the receipts. . . . How can it be pretended after such testimony by the party himself that there was any evidence of a new and different contract? A mere confirmation of the old one could not, certainly, cure the vice which was inherent in it. It would practically annul the principle to so hold."

This case is almost identical with the case at bar. Substitute the procuring of a contract from the Water Committee for an agreement between Hunter and Nolf to secure to Hunter the appointment of assistant United States assessor, and the cases are alike. Hunter and Nolf agreed that Hunter should hold the office; that they should perform the work together and divide the receipts equally. This contract was illegal and void. Nolf sought to avoid the illegality by showing a new contract to do the very thing they had agreed to do before Hunter was appointed. McMullen and Hoffman agreed to unite their efforts to secure the contract with the city and to perform it and to divide equally any profits which might result. They took the contract in the name of Hoffman & Bates. Then by a writing by which they merely confirmed the old contract, they claim to have made a new agreement. The methods adopted by them in executing so much of their

original agreement as was required to secure the contract with the city were unlawful, and rendered that agreement void. Now, it is claimed that by reducing so much of the original agreement to writing as had not been executed in procuring the contract with the city, and signing their names to it, they have made a new contract purged of the illegality of the old one, and ask the court to enforce it. By this proceeding McMullen claims to have evolved a new agreement, and to have thereby cured the vice which is inherent in the old. The evidence offered by the plaintiff and quoted at some length in this brief shows plainly that the agreement of March 6, 1893 (Plff. Ex. 1), was a mere reducing to writing of an agreement entered into long before the writing bears date.

McMullen and Hoffman combine, not as honest bidders, but to prevent competiton.

That the court may fully understand the spirit in which McMullen and Hoffman determined to make the building of the city water works at Portland an occasion out of which they should profit, and the means they proposed to adopt to effect that object, attention is called to some of the correspondence between them before the contract was let. As I read this correspondence it breathes nothing but schemes of fraud and deception and dishonesty. It imputes to men, to companies and to the water committee nothing but the basest motives and refers to them as though these persons were ready and anxious to deal with them only upon false lines.

The earliest letter in this correspondence which appears in the record is that of McMullen to Hoffman dated January 31, 1892. (R., p. 518). This letter assumes that the water committee is a mere tool of the Oregon Iron & Steel Company, a manufacturing corporation at Portland, Or. McMullen says: "If the Oregon Iron & Steel Company

can prevail on the commission to adopt cast iron it would virtually create a monopoly for them, as they are the only ones there who make cast-iron pipe, and the Risdon people tell me that they can make it there in Oregon *cheaper* than one can import it from the East. As you are acquainted with all the water commissioners and have *social* and *business* relations with many of them, I think you are in position to *counteract* this movement, and if we are to *make anything ultimately out of the job*, it will be necessary to *knock* out this *scheme*. Get in and do what you can to beat it. I understand the Oregon Iron & Steel Company has a *big pull* on the commission. What you do must be done at once, as I understand they are to determine the matter at a meeting to be held next Tuesday."

Two points are of interest in this letter. First, that the Oregon Iron & Steel Company can make pipe cheaper than any one else, and for that reason steps must be taken to keep that company from furnishing it. If this does not succeed McMullen and Hoffman will make no money ultimately out of the job; and, second, that the committee is corrupt and the tool of the Oregon Iron & Steel Company.

On January 22, 1893, Hoffman writes McMullen (R., p. 503): ". . . Now, Mac, this is a pretty large contract and requires a good deal of capital, and I think we ought to *put up* some kind of a *combination* on it. I do not care to have this contract all alone, and I was thinking it would be a good plan if you, Risdon Iron Works, Wolff & Zwicker and myself would go in on it together and take the work. I am willing to go in with you alone on the contract, but both the Risdon and Wolff & Zwicker are strong teams, and I think if we would *combine* we could take the contract *and make* more out of it than if *any one* went in by themselves. If you think favorably of this plan, you see the Risdon people and I will see Wolff. Let me know at your earliest convenience just how you feel about this. The only people I fear up here is Wolff

& Zwicker, and I think if we *combine* this way we would have a very strong team. . . .

Now, Mac, I don't think we will be able to *put up a pool* on *this work* unless we could take in the *O. I. & S. Co.*, and I doubt it very much if they would come in; of course, if we found out that we could *put up a pool on it, each one of us could go in separate*. McMullen & Hoffman did "put up a *pool*" and then went in '*separately*."

The next letter in the series is from *McMullen to Hoffman, dated Jan. 26, 1893* (R., pp. 519-520). A few quotations from the letter will show its character and spirit. "From correspondence that I have seen between the Risdon and Wolff & Zwicker, I am satisfied they are pretty intimate, and that they will pull together in some form. Now, I do not think they will *take us in*, unless we *convince* them that we are going to make a hard bid for the work. Do not let them know that you do not want the job! . . . I think that we could do better by *maikng them buy us off*. The Risdon is a large, wealthy and fourhanded concern, and they will make a hard fight for this job. I think that *we bid so hard on the job before*, that if they think we are going after it *on the same lines again*, they will be disposed to *capitulate with us*. I think that we ought to make Wolff & Zwicker understand that you and I are together, and that we are going to hit the job hard; then if they make *satisfactory inducements* when the time comes *we will quit*." . . . "If they" (the Risdon) "think they can throw you and me overboard, they will do it in a minute, so I do not think we ought to talk partnership at all; on the contrary, talk 'get the job,' then if they are *afraid* of us, they will *buy us off*."

"Perhaps the O. I. & S. Co. could be *gotten out of the way* by *giving* them the *cast-iron* work, as I do not think the Risdon could compete with them on that portion of the work; yet the O. I. & S. Co. might get a *better price* for that portion of the work if the *Risdon* and *us* should *agree* to let them alone on it, *on the condition* that they let the *wrought-iron part* of it *alone*." (R., p. 521.) "I think that we can arrange it in some way so that we can make some money out of it."

Again on *February 8, 1893, McMullen writes Hoffman*

(R., pp. 522-3): . . . "We will have to make the Oregon Iron & Steel Co. know, when the time comes, that if they *do not quit* and *let go on everything* except the *cast-iron*, that we will hit them hard on the cast-iron and make it *rocky* for them, as I understand from interview with Eastern cast-iron pipe men, who have agents here, that they can put that cast-iron down in Portland cheaper than Portland men can make it, and better, too." . . . "I think you ought to ascertain (off-hand, and without apparently caring to know) just what the O. I. & S. Co. do want in the job, and whether they will be *satisfied* with the *cast-iron* or not, and *how far* you think the *committee will go to favor them*. If the wrong man should be the low bidder, do you think they would readvertise the job over again to knock him out? I expect you to *know all about* this *very important* part of the *business* when I get up there."

Referring to the submerged pipe, for which a bid was put in at the letting on the 1st of March, 1893, by the San Francisco Bridge Co., but the contract was not then let, *McMullen says to Hoffman in a letter written March 8, 1893* (R., p. 526): . . . "I wish you would see your friends on the committee, and see if you cannot get them to reconsider the submerged pipe proposition, as I believe that we have at least $20,000 in that. If it is advertised again, it might be possible that we would get left; if we should, however, at the first bidding, do you not think we could get it readvertised again—so as to give us another chance at it? I think you will have *pull* enough with the *committee* to do this. If you cannot get it awarded on the present bids, I am in favor of looking after it very closely when it does come up again, and be in touch with every one who makes inquiry about it relative to *bidding* and *taking them in and getting a good price for it. If we can do this*, I believe it can be *gotten* the next time *with more money in it than there is now*, for the reason that the wrought-iron pipe will be cheaper than the cast-iron pipe. I hope you will keep a close watch on this, and advise me promptly, and if any Eastern men should go for it the second time, we will have *Mr. Catt look after them and take*

them in, and you can look after any one up there, and I will look after any one down here. The Risdon will probably have to get a little something out of it."

In his testimony (R., p. 214), speaking of the subsequent letting of this submerged pipe contract, Mr. McMullen says: . . . . "I don't think that I was in Portland at the second letting. I think I furnished Mr. Hoffman what ***data*** and ***information*** I had relative to it, and I relied on him to put in the bid; that is my present opinion.

"I don't think it is a fact that Hoffman notified me that he would have nothing further to do with manufacturing and laying the submerged pipe.

"Don't think it is a fact that I put in a bid for this work on my own account."

I quote here portions of what ***Mr. McMullen wrote to Hoffman on August 4, 1893***, shortly before the second letting of the submerged pipe contract, for it seems to fit so completely the evidence of the letter of February 8 and his own testimony, and to show with such peculiar force the spirit which moved these parties in their struggle after contracts for this work. (R., p. 557): . . . . "I do not want to let go the submerged pipe; want to get the job; I think we can make $25,000 on this job, but we must ***pool*** it; to do this, we will have to let the secretary, Frank T. Dodge, in, and if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened, and we will gather in everybody that is personally represented; don't think there is many." (R., p. 558.) . . "Another thing, Lee; you want to see Smith & Watson and see that they do not form any combination with any one ***else*** to bid on this work; ***take them in*** by giving them the ***cast-iron***, and hold them down to about what it is worth." . . . "I think you can arrange to get Dodge into our camp."

On their face the bids of McMullen and Hoffman were, as against each other, competing. That they were not so in fact was a ***secret*** known only to McMullen & Hoffman

and their employes. The San Francisco Bridge Company said by their bid that $514,664 was the smallest sum for which a contractor could with reasonable safety undertake to manufacture and lay the steel conduit from Bull Run river to Mount Tabor. The committee so understood it, and when they saw that this company, which had been the lowest bidder before, was underbid by Hoffman & Bates $48,997 on this single item, the committee must have regarded the bid of Hoffman & Bates exceedingly favorable for the city. But McMullen and Hoffman knew all the time that $514,664 was a mere ***fake*** and great fraud, and was intended for no other purpose.

In passing upon the plaintiff's exceptions to the answer, the learned judge of the circuit court used this language upon the feature of the case: "But when the parties presented themselves as competitors for the work they were guilty of a fraud; the tendency of what was thus done was to cause the Water Committee to believe that the bid of the defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee that in plaintiff's opinion the work could not be profitably done for less than a figure $35,000 higher than that bid by defendant, although as a matter of fact plaintiff believed such work could be done, and, except for the collusive agreement, defendant would have offered to do it for an amount $75,000 less than that at which the contract was let." In summing up the opinion, the court says: "Upon all the cases cited and to be found, and in any view of the case consistent with public policy and the principle of equity, there can be no relief in such a case." But it is due to the court and to the case to say that on the final hearing the judge repudiated this conclusion as unsound, and in so doing, in the light of the authorities he so carefully considered and digested in his former opinion and without citing one as a basis for the change, makes use of the following most astonishing statements: "There was nothing to criticise in what was done by the parties, unless their conduct in presenting a second bid in the name of the San Francisco Bridge Company operated as a fraud

on the committee. When this matter was considered on the exceptions to the answer, I was of the opinion that this was the effect of the second bid. It appeared from the pleadings that the profits from the contract at $465,667 amounted to nearly $140,000, and it seems a necessary inference that a bid by a company such as the one in question, based presumably upon careful estimates to do the work for $514,664, influenced the award that was made. But this view cannot be sustained. ***An attempt to deceive must be successful in order to operate as a fraud.*** If the second bid in this case was in effect a misrepresentation made with a fraudulent intent, it must, in order to avail the defendant, appear to have been acted upon by the committee—to have influenced their action to the public detriment." However reprehensible the act of the parties was in making the second bid, there is no presumption of fraud arising from it, and it does not appear from the evidence in the case that the Water Committee was in any degree influenced by it in awarding the contract." Every court before which the question here decided has come, from the earliest days of English jurisprudence to the hour when this decision was rendered, has in the plainest terms possible held exactly the opposite of this doctrine to be true. It seems to have been reserved to the learned judge who delivered this opinion to overrule the whole of them, without a single case ever decided by any court to support him. I note here the following cases which will be considered more fully later on:

Atcheson v. Mallon, 43 N. Y. 147.
Doolin v. Ward, 6 John. 195.
Wilbur v. How, 8 John. 443.
Swan v. Charpening, 20 Cal. 182.
Gullick v. Ward, 5 Halst. (10 N. J. Law) 87.
Thompson v. Davis, 13 John. 112.
Greenhood on Public Policy, p. 178.
Holliday v. Patterson, 5 Oregon, 177.
Richardson v. Crandall, 48 N. Y. 348.
Gibbs v. Smith, 115 Mass. 592.

Engleman v. Skrainka, 14 Mo. App. 438.
Woodruff v. Berry, 40 Ark. 251.
Jenkins v. Frank, 30 Cal. 586.
Hunter v. Pfeiffer, 9 N. E. 124.
Many other cases.

The evidence shows that the price finally agreed upon by McMullen & Hoffman and expressed in the bid put in by Hoffman & Bates was not honestly arrived at, but was raised $45,000 higher than McMullen would have bid but for the combination with Hoffman, while the bid put in by the S. F. Br. Co. was raised, as alleged in the answer, over $98,000 above what McMullen declared he regarded as a ***perfectly safe bid***. Mr. McMullen said a bid based on Catt's estimate would be a safe bid. (R., p. 276.)

Mr. Bush says (R., pp. 265-266): "He, McMullen, brought a lot of papers in the office, and showed them to me, and said they represented the result of researches on the Bull Run pipe line, and that these were estimates from New York, and also from the San Francisco office."

There were estimates made by Mr. Catt, going into all the details, and the cost of the job, plant, tools, etc. . . .

Mr. McMullen said the estimates were Catt's.

Mr. Catt's estimate for the manufacturing and laying was $416,038. (R., p. 268.) The estimate Mr. McMullen brought here of his engineer, Mr. Catt, was all ready to be submitted as a bid. It required no additional figures. McMullen said the bid prepared by Catt was a perfectly safe bid; that Catt had gone over everything very thoroughly; that the reason he did ***not put in that bid*** was that he thought he could get ***more money*** out of the job. Hoffman was always skeptical about doing the work for so little money, and kept on trying to have the bid increased.

(R., p. 281) Mr. Bush says the aggregate estimates at which he arrived, upon which a bid might be predicated for all work in connection with the manufacturing and laying

of the steel conduit from the head works to Mount Tabor, was $420,257.00 That this was afterwards raised to $479,-167. Hoffman told me to raise it. Hoffman and McMullen talked the thing over that there ought to be more profit in it. The object in making the raise was to increase the bid. They thought it was *safe* to increase it.

(R., p. 282) The bid was not raised in consequence of advices they were receiving from time to time in regard to the matter. It was simply a question of the *amount* of *profit*.

This testimony shows that *McMullen*, at any rate, regarded the estimate of Catt, $416,000, as a safe sum for which the contract might be taken. There is no reason to presume that, but for his combination with Hoffman, he would have put in a bid for that sum. If he had pursued his former tactics of putting in a "bold, hard bid," it would have been for $416,000 instead of $514,000, $98,000 more than he thought the work could safely be done for. He not only increased his own estimate from $416,000 to $514,000, but he joined with Hoffman to increase Hoffman's bid from $420,000 to $479,126, an increase of $59,-000. How could competition be more effectively destroyed? Much credit is claimed for McMullen because he urged this bid of $479,000 to be reduced, and did cause $13,500 to be deducted, reducing it to $465,667, as finally presented. The inducement to this reduction does not show that the bid of $479,126 was the honest result of the judgment of McMullen & Hoffman, as to the sum the work could be done for. Mr. Bush says it was cut off at the very last hour. (R., p. 266.)

McMullen came into the office very much excited, and said he had made up his mind that "we were too high and that we had got to take off something." We took off five cents a yard on the item of excavation; this amount is 270,000 yards at five cents a yard, amounting to $13,500.

References by his counsel to this act on the part of McMullen, at former trials, would lead one to suppose that McMullen's conscience had suddenly smitten him with the conviction that too much money was to be demanded from the city, and he had been impelled by a high sense of moral duty to hasten with all speed and have the bid reduced before it was "everlastingly too late." This is presented to show how tender McMullen was of the interest of the city. But Mr. Bush gives a reason which crushes this idol, and shows the plain truth of the matter. (R., p. 298) Bush says: "McMullen came in in a somewhat excited state of mind about an hour before the bids were submitted, and insisted upon the bids being reduced. The reason he gave for it was that *he had sized* up some of the *other fellows' bid.* He said *Mr. Wakefield's.* He said, *'We have to come down, or we won't get the job.' That was the reason why it was reduced.*"

Mr. Bush says it was thought that by reducing the bid $13,500 *they would get below Wakefield.*

This circumstance shows plainly enough that the bid $479,126 which McMullen and Hoffman had agreed upon was not made in good faith; was not an indication of what they thought the work could be done for with a reasonable profit. If the bid had been prepared upon that basis, McMullen would not have insisted on throwing off $13,500 at a single dash, and evidently only limiting the reduction to that sum because he had reason to think from what he had heard this would reduce the bid below *Wakefield.* The testimony shows that McMullen and his engineers had made very careful estimates of this work, and had decided that it could be safely done for $416,000; that what was added above that sum was the result of the combination with Hoffman. The amount added in the first instance to the bid agreed upon was $63,000. It was perfectly safe in the judgment of McMullen to reduce this

sum $13,500, for that would still leave $49,500 more money than he thought necessary to make a safe bid. It is manifest that but for the combination with Hoffman, McMullen's bid, instead of being $514,664, as it was, would not have exceeded $420,000, for it will be remembered that McMullen prides himself upon being what he calls a "bold, hard bidder" in such contest. This removal of McMullen as a competitor was not the result of a joint purpose of himself and Hoffman, honestly conceived and publicly announced, to secure contracts for work from the Water Committee, but was the result of a design to suppress competition, while pursuing a course of action intended to impress the committee and the public that they were in fact competitors. The true character of this proceeding is very forcibly and clearly stated by the learned judge who delivered the opinion upon McMullen's exception to the defendant's answer (R., p. 70):

"But when the parties presented themselves as competitors for the work they were guilty of a fraud; and the tendency of what was thus done was to cause the Water Committee to believe that the bid of the defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee that in plaintiff's opinion the work could not be profitably be done for less than a figure $35,000 higher than that bid by defendant, although, as a matter of fact, plaintiff believed such work could be done, and, except for the collusive agreement with defendant, would have offered to do it, for an amount $75,000 less than that at which the contract was let." It is true that this opinion was rendered upon exceptions to the answer, and before the testimony was taken; but quotations from the testimony in the record, set out in this brief, show that in all material particulars the averments of the answer are true, and the remarks of the court quoted apply with equal force to the case made by the evidence.

The contract with the city, as well as the agreement between McMullen and Hoffman, by which it was secured, are indissolubly connected, are against public policy and void.

The contract of March 10, 1893 (R., p. 118, Stipulation of Evidence, Subd. 3), between the Water Committee and McMullen and Hoffman and in the name of Hoffman & Bates, was obtained by means so false and fraudulent that it cannot have the aid of the law to enforce it, as authorities hereafter to be cited show beyond question. The evidence shows this contract to be the result of an agreement between the San Francisco Bridge Company, or their representative, on one side, and Hoffman & Bates on the other. That this agreement was entered into long before the contract of March 10 was executed, and was entered into for the special purpose of securing the contract and performing the work. The agreement was one and indivisible. That the contract of March 10 was the direct product of the agreement to secure and perform it, if secured. That the means agreed upon were fraudulent, and they were carried out as agreed. After the combination was formed, the plans laid, and so far executed as to have secured the contract, then, for the first time, McMullen and Hoffman reduced to writing so much of their original agreement as remained to be performed. They entered into no new agreement. In this writing, special mention is made of what had already been done as a part of the undertaking, and this is made for the purpose of showing what was claimed to be McMullen's interest, not to convey a new one. The agreement of McMullen and Hoffman, and the contract of March 10, are indissolubly connected. The acts required to perform one necessarily fulfill the demands of the other. The provisions of the contract of March 10 on the part of the Water Committee define the duties imposed and intended to be imposed upon

themselves by McMullen and Hoffman in their original agreement, afterward reduced to writing. If one of these contracts is void, the other is necessarily so.

The contract of March 10 is void as the *result* of the frauds practiced by McMullen and Hoffman to obtain it; certainly for a much stronger reason, the contract between the same parties to practice the fraud which brought about the *result*, and then to profit by it, must be more plainly void. If McMullen and Hoffman could not have the aid of the court to enforce the contract of March 10 against the city, certainly they cannot have such aid to enforce the same contract, or another based upon and growing directly out of it, between themselves.

Agreements the natural tendency of which is to prevent competition in sales at auction or lettings upon sealed bids, are contrary to public policy and cannot have the aid of the courts to enforce them.

In all sales by public auction, in all public lettings upon sealed proposals, where competition is involved, the public has a direct interest, and courts watch all such proceedings with jealous care, and, if they are found tainted with fraud, refuse to countenance or support them. This class of cases forms a distinct and independent class, which the rule of law just stated controls. This rule is so well established, is of such long standing, that in its application it is independent of and uninfluenced by rules applicable to contracts made by private parties in violation of some statute or rule of common law; contracts which are unlawful because forbidden, and involving no question of public policy beyond the single fact that a law has been violated. The rule in this class of cases does not apply to the class first named. In this case the evidence shows that the design of the combination between McMullen and Hoffman

was to prevent competition in bidding, and it also shows that the city was in fact a sufferer to the amount of many thousands of dollars. But it is not necessary, in order to make defenses of this character available, to show that the parties *intended* to injure the public or that the public was in fact injured by the course adopted. All that the law requires is that it appears that the natural tendency of such an agreement is to injuriously influence the public interests. The principles of law which seems to me ought to be controlling in this case are stated by the court of appeals of New York in the case of Atcheson v. Mallon, 43 N. Y. 147. An act of the legislature of New York authorized the board of town auditors to receive sealed proposals for the collection of the taxes of that town, and award the collection thereof to the person offering terms most favorable to the town. The board advertised, and among others Atcheson and Mallon each put in proposals. Their proposals were seen by both the parties before they were sent in, but it did not appear that any change was made in either of them in consequence of the knowledge by one bidder of the proposal of the other. At the time the proposals were sent in to the board of auditors, Atcheson and Mallon agreed that, if either obtained the award for the collection of the taxes, both should share equally in the profits and be liable to an equal share of the losses. The contract was awarded to Mallon, who collected the taxes and made a profit of $400. He refused to divide with Atcheson, and to compel him to divide this suit was brought and there was a verdict for the plaintiff for $200. Judgment for plaintiff. On appeal to the general term, the Supreme Court reversed the judgment and ordered a new trial.

Folger, J., delivering the opinion of the court of appeals, affirming the decision of the general term, says (p. 149):

"It is not necessary, for the determination of this case, to inquire whether the effect of the agreement between the parties was in fact detrimental to the town of Oswagatchie. The true inquiry is, Is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is that agreements which in their necessary operation upon the action of the parties to them tends to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy, and are void."

After discussing the general tendency and necessary effect of such contracts upon the public interests involved, the opinion says of the facts disclosed by the record in that case: "It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce."

The opinion then proceeds as follows: "Perhaps there is nothing in the statute which would have prevented the parties from making an *avowedly joint proposal*. Though the language of the second, third and fourth sections, and the analogy of the laws for the collection of taxes, contemplate but one person as town collector. But a joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are *public* and *avowded*, and not *secret*. The risk, as well as the profit, is joint and *openly* assumed. The public may obtain at least the benefit of the joint responsibility, and the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid."

This case is decisive of the case at bar. If Atcheson could not recover on the case he made, certainly McMul-

len cannot upon the facts disclosed by this record. Let them be compared:

1st. Atcheson and Mallon exhibited to each other the proposal he was about to submit.

2d. McMullen and Hoffman did the same.

3d. No change was made in the proposal of either Atcheson or Mallon after the contents were made known to the other.

4th. The proposals presented by McMullen and Hoffman were repeatedly changed as the result of the combination and knowledge each had of the other's bid, and the estimate of McMullen's engineers, which he repeatedly declared he regarded as a safe bid for the work, was, as a result of this knowledge, increased from $416,000 to $514,000, and that of Hoffman was increased, with McMullen's consent, from $420,000 to $479,000, and was then reduced at the instance of McMullen and with the consent and concurrence of Hoffman to $465,000.

5th. The contract between Atcheson and Mallon for a division of the profits, if a contract should be awarded to either, was made before the proposals were deposited with the board of auditors, and no writing was signed afterward.

6th. The contract between Hoffman and McMullen for the division of the profits in case a contract should be secured was made before the proposals were presented to the Water Committee, and after the contract had been awarded McMullen and Hoffman reduced to writing the agreement, by and under which the contract was secured and the work was to be done.

7th. The agreement between Acheson and Mallon was *secret*, and was unknown to the board of auditors.

8th. The agreement between McMullen and Hoffman was secret and was unknown to the Water Committee.

9th. The money earned for collecting the taxes was paid over to Mallon; the contract with the town was fulfilled and the transaction was finally closed.

10th. When this suit was commenced, neither the contract with the city nor the agreement of McMullen and Hoffman had been performed; only a part of the money earned had been paid over.

11th. Atcheson sued Mallon for money in his hands in which Atcheson had an undivided half interest if the contract between himself and Mallon was valid; he simply asked the court to require Mallon to pay him what was claimed to be due and in the hands of Mallon, on a completed contract.

12th. McMullen seeks a decree to have the unearned profits of a contract divided; he asks for a receiver to complete the contract with the city and the agreement with himself and Hoffman, and he prays an injunction to prevent payment to Hoffman of the money due and to become due on the contract.

The principle laid down in Atcheson v. Mallon is applied in *Doolin v. Ward, 6 John. 195.* This was a sale of goods at auction, in which Ward agreed not to bid against Doolin, for certain goods both wanted, provided Doolin would divide the goods equally when purchased. To this Ward agreed. Doolin purchased the goods and refused to divide. Ward sued to recover his share, and recovered in the lower court. The judgment was reversed on appeal. The court held that the contract declared on was without consideration and void. It was also against public policy and tended injuriously to affect the character and the value of sales at auction."

Wilbur v. How, 8 John. 443.

A job for making a road was set up at auction and it was agreed between the plaintiff and defendant that if either of the parties should bid off the job, it should be di-

vided between them. Wilbur bid off the job and refused to divide. How sued Wilbur and recovered a judgment for $20.

On appeal, the court of errors reversed the judgment. "Held, that the case comes within the principle laid down in Doolin v. Ward. That the contract was nudum pactum and a fraud on the vendor." It should be observed that in this case it does not appear that the parties ever saw each other's bid.

Sharp v. Wright & McDonald, 35 Burt. 236.

The parties to this suit were bidders at a public sale of the Albany bridge. Wright & McDonald were the lowest bidders. They sold out to Sharp, who was next lowest; were paid $1500 and given nine promissory notes by Sharp. They exposed the fact of their sale to Sharp, and the result was that Sharp did not get the contract on his bid. He claimed that his failure was the result of Wright & McDonald's exposing the fact of the sale to him, when, as he claims, they agreed to assist him in getting the contract and the money was paid and the notes delivered with the understanding that if he failed to secure the contract the money was to be refunded and the notes were to be delivered up. Sharp sued to recover the $1,500 and to have the notes surrendered or the collection of them enjoined. It was held that there could be no recovery in such a case.

Leonard, J., p. 238: "It is against public policy to uphold such a contract. It does not help the plaintiff's case that the defendant failed to observe the rule of 'honor among thieves.' The plaintiff cannot insist that he has been a victim because the defendants disregarded that rule, and that he is exempt from the application of the maxim, '*potior est conditi defendentis*.'"

Clarke, P. J., says: "The parties are clearly *in pari delicto* in the commission of an offense not only *malum prohibitum* but *malum in se*; and in relation to parties so situated the law unhesitatingly and invariably says: First, whenever they have fraudulently or illegally contracted to

do a thing, it refuses to enforce the execution or to award damages for the non-execution of such contract; and second, whatever they have executed, it refuses to lend its aid to either party to disturb."

People v. Stepheus et al., 71 N. Y. 527-546.

This case grew out of fraudulent combinations of bidders for contract to make certain repairs to the canal.

At p. 546, Allen, J., speaking of sales by public auction, uses this language: "The general rule is that a purchaser at an auction who uses unfair means to prevent competition cannot hold the property. These general principles are not questioned, and are uniformly sustained by the courts."

Swan v. Chorpening, 20 Cal. 182.

This case relates to the letting of contracts upon sealed proposals to carry the United States mail. Chorpening was a mail contractor, as was also Swan. Chorpening proposed to bid for a contract to carry the mail between Placerville and Salt Lake City. Swan proposed to bid for that part of the same route between Placerville and Carson Valley. Swan withdrew his bid in pursuance of an agreement with Chorpening that if he secured the contract he would either divide the contract price of carrying the mail between the last-named cities or would pay Swan a gross sum equivalent to such proportion. Chorpening secured the contract, and carried the mail, but refused to keep his contract with Swan. Swan sued and recovered a verdict for $30,000, upon which judgment was entered. An appeal was taken to the Supreme Court.

Cope, J., at p. 184, says: "This suit is upon an agreement entered into in fraud of the policy of the government in respect of the mode of providing for the transportation of the mails. Contracts for that purpose are required to be awarded to the lowest bidder, and any agreement tending to deprive the government of the advantage of competition in the bidding is unlawful and void." The opinion then states the facts of the case, and holds the contract

void, citing Gullick v. Ward, 5 Halst. (10 N. J. Law) 87, which is held decisive of the case.

The court say (p. 186): "An agreement not to bid, and an agreement to withdraw a bid already put in, are certainly obnoxious to the same legal objection. It is contended that the particular circumstances of this case relieve the transaction of its illegal character; but we take a different view of these circumstances. The purpose for which the bid was to be withdrawn we do not consider material, nor do we regard as important the fact that the withdrawal resulted in no actual injury to the government. The agreement was entered into for the accomplishment of a project of which the government was ignorant, and whether or not the withdrawal would be detrimental was a matter of conjecture only. The government was not consulted, and, so far as appears, the department intrusted with the management of these affairs neither knew of the agreement nor assented to its withdrawal. . . . The agreement to withdraw was undoubtedly injurious in its tendency, and the policy contravened by it is only to be satisfied by declaring its invalidity."

Gullick v. Ward, 5 Halst. (10 N. J. Law) 87.

This case grew out of public lettings of a mail contract, at which Gullick contemplated being a bidder, but for a consideration agreed to be paid by Ward, another bidder, withheld his bid and so limited competition. Ward refused to pay the sum promised and Gullick sued to recover on the promise.

In deciding the case the Supreme Court of New Jersey, speaking by Ewing, C. J., at p. 90 says: "The policy of the provision contained in the act of congress requiring this procedure by the postmaster-general, in thus publicly inviting proposals, is to enlarge the number of offers, to increase the competition among persons disposed to contract, and thereby not only to secure to the United States faithful and capable carriers, but to procure the performance of this important public service in the best manner and upon fair, just and reasonable terms. . . . Now an arrangement which shall diminish the number of com-

petitors, lessen the number of proposals or induce any one or more to abandon his intention of making an offer to contract, is most evidently in direct contravention of the policy of the act of congress, and tends to defraud, or, perhaps it may be broadly asserted, does at all times actually defraud, the United States." The opinion proceeds to state the reason why in this case the acts of the parties resulted to the actual damage of the United States, and then says: "The circumstances disclosed on the trial, then, most manifestly support the conclusion naturally drawn from the agreement itself; that in object and effect it was inconsistent with the policy of the act of congress, and tended, to say the least, to defraud the United States." The court then cites many authorities showing the principles of law which compel a court to refuse to enforce a promise founded on such consideration, as are very clear, very salutary and perfectly well established. Among the cases so cited are Jones v. Randall, Cowp. 39. Lord Mansfield said: "Many contracts which are not against morality are still void as against the maxims of sound policy." In Blachford v. Preston, T. R. 95, Lawrence, J., said: "A plaintiff cannot recover in a court of justice, whose cause of action arises out of a contract made between him and the defendant in fraud, or to the prejudice of third persons."

Jones v. Caswell, 3 John. cases 29.

This case arose out of a contract to forbear to bid at a sheriff's sale of real estate, and a promissory note was given for the money agreed to be paid.

Justice Radcliff said: "It was a consideration that ought not to be sanctioned in a court of justice. The law has regulated sales on execution with jealous care, and enjoined such proceedings as are likely to promote a fair competition. ***A combination to prevent such competition is contrary to morality and sound policy.***"

Justice Kent said: "I think the consideration must be adjudged void, as against public policy and the interest of the original debtor, whose property was liable to be sacrificed by such combination."

Doolin v. Ward, 6 John. 194; Wilbur v. How, 8 John. 444, are cited and approved.

Thompson v. Davis*, *13 John 112, is cited and approved upon the point that an ***agreement*** which ***tends*** to prevent competition at a sale under execution is contrary to public policy and void. Spencer, J., said: "It had been urged that the plaintiff was not bound to bid on the second execution and was therefore at liberty to enter into this agreement." (Exactly the contention of counsel for McMullen, i. e., that he was not bound to bid at the letting of the work in question in this suit and was therefore at liberty to make any combination as to his own course as a bidder). "This is not the test of the principle. In none of the cases cited was the party bound to bid; he suffered himself to be bought off in a way which ***might*** prevent a fair competition. The abstaining from bidding upon consent and by agreement, under the promise of a benefit for thus abstaining, is the very evil the law intends to repress. A public auction is open to every one, but there must be no ***combination*** among persons ***competent to bid***, silencing such bidders, for the ***tendency*** to sacrifice the debtor's property is inevitable." In the case last cited the contracts sought to be enforced were held void because a ***combination*** had been entered into under which the number of bidders was reduced. In the case at bar the same result was intended and accomplished by means infinitely more fraudulent and deceptive than in either of the cases cited. In all these cases the bidder either withdrew his bid after it was deposited or declined to appear as a bidder at all. That was dealing more fairly with the parties charged with making the sale or letting the work than was the conduct of McMullen and Hoffman in this case. Nobody pretended to be a bidder who was not. In the case in suit McMullen and Hoffman had formed a combination by which it was agreed that McMullen or the San Francisco Bridge Company should withdraw or should not be a competitor, but that he or it should be a bidder in

form. This fact was not made known to the water committee. McMullen or the San Francisco Bridge Company was, in the language of Justice Spencer supra, "a person competent to bid," but there was a "combination" between himself and Hoffman by which McMullen had agreed to withdraw the San Francisco Bridge Company as a competitor, and as appears by his own testimony did, in fact, withdraw as a competing bidder, though he not only kept the fact of his withdrawal secret, but he falsely represented himself by his affirmative action to be a bona fide competitor. If the cases cited are not in the details of their facts exactly like the case in suit, they involve the application of the principle invoked here, and upon facts vastly less to the prejudice of the parties claiming relief than the facts in this case are to McMullen, I am sure, if in the case of the agreement not to bid at a sale, mentioned in either of the cases cited, the party so agreeing had further agreed to *appear* as a bidder and to put in a bid with the knowledge of the other bidder which "did not represent anything" was simply "put in to have it high enough that it would not receive any consideration," (McM., R., p. 229), he would have been still less entitled to relief. Would not his fraud rather afford an additional reason for a more rigorous application of the rule?

Other cases to the same effect and which show that "*the end accomplished is not the test by which we are to judge of the validity of such contracts, but rather the end aimed at by the parties.*" *Is the natural tendency of such an agreement to injuriously influence the public interest?*

Atcheson v. Mullon, 43 N. Y. 147, 149.

Weld v. Lancaster, 56 M. E. 453.

A contract to carry the mail was awarded to Weld. Lancaster was the next lowest bidder. Lancaster delivered to Weld a written promise to pay him a sum of money and to hold him harmless against any claim of the

United States if Weld would decline to accept the contract as awarded and let it go to Lancaster. Lancaster got the contract, but refused to pay as agreed. Weld sued. Lancaster set up the illegality of the contract; one point made by the plaintiff in support of his claim was that the government suffered nothing by Weld's withdrawal because fully indemnified. The court said: "The end accomplished is not the test by which we are to judge of the validity of the contract, but rather the end aimed at by the parties."

Greenhood on Public Policy, p. 178.

"Any agreement which in its object or nature is calculated to diminish competition for the obtainment of a public or ***quasi*** public contract to the detriment of the public or those awarding the contract is void."

Hellen v. Eckersby, 6 El. & Bl. 64.

"All contracts perjudicial to the interests of the public such as contracts tending to prevent free competition are void."

Holladay v. Patterson, 5 Oregon 177.

"The question of the validity of the contract does not depend upon the circumstance whether it can be shown that the public has, in fact, suffered any detriment, but whether the contract is, in its nature, such as ***might have been*** injurious to the public."

Richardson v. Crandall, 48 N. Y. 348.

"In all cases where contracts are claimed to be void as against public policy it matters not that any particular contract is free from any taint of ***actual*** fraud, oppression or corruption. The law looks to the ***general tendency*** of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate."

Gibbs v. Smith, 115 Mass. 592.

The labor of inmates of house of correction was to be sold at auction. For a consideration to be paid to Gibbs, if Smith should secure and accept the contract he (Gibbs) agreed not to bid. Smith got the contract and performed

it, and Gibbs sued to recover the sum promised to be paid for withholding his bid. Plaintiff also offered to prove that the county was not in any manner injured by the agreement. The court held that the contract was against public policy and void, and directed a verdict for the defendant.

Devens, J., delivering the opinion of the court, said: . . . "Agreements, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy and in fraud of the just rights of the party offering it, and therefore illegal. The contract in the present case is manifestly of the latter class. . . . The contract thus made being against public policy no action can be maintained upon it by the parties thereto.

"Nor is it any answer to show that no injury has been done to the party selling. That which renders the contract illegal is not the injury the parties have ***actually occasioned***, but the purpose which they must have contemplated when it was made; its validity is tested not by its ***results*** but by its objects as shown by its terms."

Engleman v. Skrainka, 14 Mo. App. 438.

"It is a uniform rule founded on public policy that any contract the necessary effect of which is to stifle competition in bidding at public or private sales or at lettings of public or private work is void."

Woodruff v. Berry, 40 Ark. 251.

Public printing let at public letting on sealed bids. Several printers agreed to let one bid off the work and share the profits equally. It was held on a trial testing the validity of a contract based upon such a bid that it was against public policy and void, if either the ***intention***, the ***effect*** or the ***necessary tendency*** of the combination be to ***stifle*** or ***limit competition*** in the bidding.

Jenkins v. Frink, 30 Cal. 586.

There was a contract in writing between several persons for one to buy land about to be offered at sheriff's

sale for the benefit of all. Such contracts held to be void as against public policy and fraudulent, if made to prevent fair competition in bidding or for any other fraudulent purpose.

Hunter v. Pfeiffer, 9 N. E. 124 (Ind.).

A free gravel road was to be built by Warren county, Indiana, and the work was to be let upon sealed bids to the lowest bidder. Hunter, Pfeiffer and two others formed a co-partnership with the avowed and pretended purpose of bidding for the work, and authorized Pfeiffer to bid. Hunter and the other associates to sign such bonds as might be required. Pfeiffer bid the work off for $13,465. Contract executed by the board to Pfeiffer. Hunter and the others signed the bond required according to agreement. Hunter is excluded from the work and sues Pfeiffer. He alleges that the contract is worth $3,000; that $10,000 will complete it and that his interest is worth $1,000, and having been excluded by Pfeiffer he is entitled to judgment for the amount claimed. He alleges that but for the co-partnership which was formed he would have bid and could have made $1,000 on the contract. In deciding the case the supreme court of Indiana, speaking by Mitchell, J., say: "In effect, this is to say that the appellant and appellee were about to bid for the construction of the public work which was to be let in pursuance of law, and that the appellant was induced to withhold a lower bid than that which the appellee proposed to make in consideration that he should be taken into partnership and be permitted to share in the profits of a contract which the appellee Pfeiffer was thus to secure. ***Upon all such partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a divison of profits anticipated or accured.*** . . . If the courts should lend any countenance to such a contract of partnership as that disclosed in the complaint, in either aspect in which it is presented, ***the effect would be to afford facilities for bidders to enter***

into secret agreements and combinations with each other, and thus enable them to defeat the plain purpose of the legislature in requiring such contracts to be let to the lowest bidder. The whole purpose of the statute is to encourage open, fair competition between responsible bidders, and any ***secret combination–call it partnership or anything else***–the effect of which is to abate honest rivalry or prevent fair competition, is to be condemned as in violation of public policy and void. No one can predicate an enforceable right upon such an agreement. Atcheson v. Mallon, 43 N. Y. 147; Woodworth v. Bennett, Id. 273; Gibbs v. Smith, 115 Mass. 592; Hannah v. Fife, 27 Mich. 172; Greenhood on Public Policy, 178.

"The partnership contemplated by this agreement was a ***secret arrangement unknown to the officers who had the public interest under their protection.*** It was intended that the officers should believe that they were contracting with Pfeiffer alone, while he and those who were accepted as sureties on his bond intended among themselves a ***secret partnership*** wholly unknown to the board of commissioners. No lawful contract of partnership resulted from such a combination. Lewis v. Armstrong, 3 Mylne & K. 54 Persons who engage in forming partnerships of the character disclosed must rely for a division of the resulting profits upon those sentiments of honor which are supposed to prevail among all who form combinations which are condemned by the policy of the law.

"The purpose, tendency and necessary effort of such a contract was to stifle fair, open, actual competition and to perpetrate a fraud upon the public officers." The court then laid down a rule by which a partnership contract for doing such work might be legitimately made, thus: "If, in letting a contract such as this, parties ***without knowledge of the bids each other*** submit their bids as the law requires and afterwards enter into a partnership for the construction of the work with the knowledge of the officers letting the same, a question of a different character is presented."

This case is almost "on all fours" with the case at bar. It is perfectly evident that the co-partnership entered into between the San Francisco Bridge Company and Hoffman

& Bates in 1891 was entered into for the sole purpose of removing each of the parties as a competitor against the other when the work should be again offered by the water committee. That their ***combination*** was ***secret*** and intended to mislead the water committee there is not a shadow of a doubt, especially when the conduct of the parties is viewed in the light of the correspondence between them showing the spirit in which they were operating. In the case cited only Pfeiffer bid, and the public officers having the work in charge supposed him to be the only person interested. In this case these parties did more. The water committee were not only led to suppose they were contracting alone with Hoffman & Bates, and that they were the only persons interested in the bid deposited, but they had before them what was equivalent to a declaration by McMullen that the San Francisco Bridge Company, a known low bidder, was not only not interested with Hoffman, but that he was a competitor for the same work, higher on the manufacturing and laying, but lower on every other item upon which both parties bid. The committee never knew the true character in which these parties appeared as bidders until this suit was commenced. This case alone, without some other authority disputing it, ought to be sufficient to justify this court in affirming the decision of the United States circuit court of appeals. No such opposing authority has been found, for the reason, as I believe, none such exists.

Hannah v. Fife, 27 Mich. 172.

The judge of the circuit court in his opinion upon the exceptions to the answer, referring to Hannah v. Fife, says (R., p. 58): "This was a case where the party to whom a contract was awarded for the construction of a swamp land state road entered into a contract with his competitor by which the latter took the contract upon terms somewhat more favorable for the public than the bid upon which the award was made, and agreed to pay the

successful bidder eight sections of land as a bonus for the relinquishment of his bid. The law allowed two sections of land per mile of road as the maximum quantity for the work. Each of the two bids was for this amount. The bid, however, of the unsuccessful bidder, who subsequently took the contract by agreement as stated, was for a roadbed only sixteen feet wide, while the state requirements were for one twenty-one feet wide. The court said that there was no evidence of a previous agreement between the parties except such inferences as may be drawn from the circumstances and the contracts made, and that it was 'difficult to resist the conclusion that these things tend strongly to show the existence of some such previous understanding,' but the court held that whether there was, in fact, any such secret understanding was immaterial; that without such understanding the ***tendency*** of all ***such contracts*** between bidders as that in existence in this case 'must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder'; that it 'was this ***tendency*** rather than the ***fact of actual fraud*** in the ***particular transaction*** which is generally recognized as ***rendering contracts void as against public policy,***' and that the contract sued upon must be held void upon this ground. The doctrine of the case, in short, is that ***secret*** agreements between bidders for their mutual profit and to avoid competition with each other ***while keeping up the appearance of competition***, and ***all agreements having that tendency are void***, and will not be enforced; nor will an agreement between different sets of bidders for a public contract, by which one agrees, in consideration of a sum of money to be paid by the other, to withdraw his bid and assist the latter to obtain the contrace be enforced."

Kelly v. Devlin, 58 How. Pr. 487.

In this case it was held that a ***secret partnership*** made by two persons that they were to be equally interested in the contract for the work obtained by one of the two parties

is illegal, being against public policy, and cannot be enforced.

Noyes v. Day, 14 Vermont, 384.

This was an action to recover the amount of a promissory note given by defendant in consideration that plaintiff would forbear to bid for the support and maintenance of certain town paupers at a public auction. Held that the transaction was contrary to public policy and the note void.

King v. Winants, 71 N. C. 469.

In this case plaintiff and defendant entered into an agreement not to bid against each other so as to enable one or the other to get the contract for the care and maintenance of certain sick persons in the service of the United States and others. The contract held illegal and void. (Brooks v. Martin, distinguished).

Board of Commissioners v. Verbarg, 63 Ind. 107.

The defendant obtained a contract to do certain work which was let to the lower bidder, by buying off another bidder. This fact being shown, the supreme court of Indiana held that the contract was obtained by fraud, was against public policy and could not be enforced.

Lloyd v. Malone, 23 Ill. 41.

In this case the supreme court of Illinois held that an agreement among parties not to bid against each other at a public sale of land being designed and calculated to stifle competition, is a fraud upon the law and against public policy, and will afford grounds for avoiding the sale against a purchaser participating in the fraud.

1 Dillon on Municipal Corporations, Sec. 470 (3d Ed.).

"The rule against combinations to prevent bidding at auction sales applies to proposals for government works in response to a call therefor aiming at a contract with the lowest bidder; and combination of contractors whereby

the privilege of bidding is secured by one without competition is against public policy and illegal."

2 Pomeroy Eq. Sec 934 (2d Ed.).

Where, in pursuance of its general policy of letting contracts for public works or for supplies to the lowest bidder, the governmental officers issue proposals for bids, a ***secret combination*** and agreement among contractors to refrain from bidding and to prevent competition falls under the same rule, and is illegal. The author in a note (2) cites in support of this proposition Weld v. Lancaster, 56 Me. 453; Atcheson v. Mallon, 43 N. Y. 147; People v. Stephens, 71 N. Y. 527; Stevens v. Perrin, 12 Kansas, 297; Swan v. Chorpening, 20 Cal. 182, and other cases cited in note 1 to same section.

Hyer v. Richmond Traction Co., 80 Fed. Rep. 83[illegible].

Rival applicants for a street-car franchise in Richmond, Va., agreed to combine in order to prevent competition between themselves or by others in procuring the franchise and to avoid the imposition of conditions by the municipal authorities. The cause came before the United States circuit court of appeals May, 1897.

Simonton, Circuit Judge, delivered the opinion of the court: ". . . Any effort which stifles competition or prevents a fair and reasonable price for property, is against public policy. Especially is this the case when property is a public or quasi public franchise. In the case at bar there were two bidders before the municipal authorities of Richmond for the franchise of a street railway. Naturally and normally that competitor would receive the franchise who made the greatest concession to the public interest. It was withdrawn by the coming together of the parties, who agreed to abandon it for fear they would neutralize each other, and also for fear that the passage of the franchise in favor of one of the two competitors would be loaded with such onerous and exacting conditions that no capitalist could be induced to put money in it. In other words, the competition would induce great and extraordinary concessions for the public good. To prevent this it

was abandoned. Among themselves they would decide what names to be used in procuring the franchise and the policy to be used in prosecuting it; that is to say, there being but one contractor in the field the promoters themselves could, in the absence of competition, decide to whom the contract should be awarded, and could, in some measure, dictate the terms and concessions to be used in procuring the franchise. *The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interest? The rule is that agreements which in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principals of sound public policy, and are void. Citing Atcheson v. Mallon, 43 N. Y. 147.* The conclusion is not unreasonable that the contract was against public policy and void. But it is contended that if this be admitted, the complainant is still protected by the doctrine laid down in Brooks v. Martin, 2 Wall. 80, citing a number of cases in which the rule in that case has been followed, and quoting from the opinion of Judge McCrary in Cook v. Sherman, 20 Fed. 170:

"When several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated, and the proceeds of the enterprise have been actually received, and carried to the credit of one of the parties, so that he can maintain an action therefor without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief." This construction of Judge McCrary is sustained upon examination of the case of McBlair v. Gibbs, 17 How. 233, which is the leading case upon which this principle depends. In that case and in all quotations cited in support of it, the cause of action was not the illegal transaction—the void act—but a subsequent independent contract which the law raised. The difference is between enforcing illegal contracts and asserting title to money derived from them. Tenant v. Elliott, 1 Bos. P. 3; Farmer v. Russell, Id. 296; Thompson v. Thompson, 7 Ves. 473, all cited and approved in McBlair v. Gibbs, supra. Sir William Grant, in the case in 7 Ves. 473, clearly states the principle. In

that case there had been a sale of the command of an East India ship to the defendant. This was an illegal transaction. In consideration of the sale he had agreed to pay an annuity of £200 to the previous commander, from whom he purchased, so long as he remained in command. Defendant, after remaining in command for some time, retired and secured the retiring allowance of £3,540. The bill was filed to get a decree enforcing the contract, and investing so much of this as would produce £200 per annum. The objection was made that the contract providing for the annuity was illegal, and a court of equity would not enforce it. The distinguished master of the rolls held the contract illegal. He recognized the equity in the fund, if it could be reached by a legal agreement, but there was no claim on the money except through the medium of an illegal agreement, which, according to the determinations, cannot be supported. "How, then," says he, "are you to get at it except through this agreement? There is nothing collateral in respect of which, the agreement being out of the question, a collateral demand arises. In the case at bar the entire cause of action is on the agreement which is void through public policy. The complainant depends altogether upon that agreement, and seeks to set aside everything that has been done, and to enforce the specific performance of that agreement. He asks the court to enforce this illegal contract, and requires the aid of the illegal transaction to establish his case. It follows that the contract under consideration can neither be enforced nor made the basis of any relief in a court of equity. The maxim *in pari delicto* applies. The court will leave the parties to such a contract precisely where it finds them. Courts cannot be made the handmaid of iniquity."

Upon the theory of the defense in the case at bar, the foregoing case is directly in point and clearly states the reasons why the plaintiff here cannot recover. These reasons are, 1st, that the illegal contract which is made the basis of this suit is contrary to public policy, is illegal and void; and, 2d, the relief sought can only be had by the aid of this illegal agreement. If the contract is legal and

valid, then, of course, this case is not in point, nor is Thompson v. Thompson, 7 Ves. 473. Indeed, if the contract upon which the suit is based is valid, then this branch of the defense fails. This is the point the court is to determine. The defendant claims that the testimony in the record, when considered in the light of the authorities upon the subject of sales at public auction, and lettings of contract upon sealed proposals to the lowest bidder, shows too clearly for serious question that the contract referred to is against public policy and void. Being so, the court cannot, under the law, give relief, even though it should appear that an equity exists in the fund in favor of McMullen. He can reach it only through a contract made illegal by his own act. Thompson v. Thompson, 7 Ves. 473. The reasons why the court will not lend its aid in such cases are well and clearly stated by Mr. Justice Johnson in ***Bank of U. S. v. Owings, 2 Pet. 527. At p. 539*** the learned justice says of a contract held to be illegal: "The answer would seem to be plain and obvious that no court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country; how can they, then, become auxiliary to the consummation of the violations of law. . . . There can be no legal right where there can be no legal remedy, and there can be no legal remedy for that which is illegal." After quoting from a number of English cases, Webb v. Pritchett, 1 B. & P. 264, is cited, and this language quoted: "The court cannot give assistance to the plaintiff consistently with the principles which have governed the courts of justice at all times. Persons who engage in such transactions must not bring their cases before a court of law."

Scott v. Duffy, 14 Pa. St. 18.

The test whether a demand connected with an illegal transaction is capable of being enforced at law is, whether the plaintiff requires the *aid* of the illegal transaction to establish his case.

Morrison v. Bennett, 52 Pac. Rep. 553.

This was a suit for an accounting for money which had come to one of the parties through a racing transaction which was illegal. The language of the court applies with great force to the facts developed by the record in this case. (P. 557.) "No court will lend its aid to assist the plaintiff in enforcing an accounting in such a case. The very statement of the evidence proves that the object of the parties was most iniquitous, and that the methods agreed upon and doubtless fully executed were all dishonest, immoral, deceitful and corrupt. Men who associate themselves for the purpose of cheating others cannot ask the courts to distribute their booty by adjudging the demands of one against the others arising out of their quarrels over their plunder. As said by Justice Baldwin in 4 Peters, 184: "Public morals, public justice and the well-established principles of all judicial tribunals alike forbid the interposition of courts of justice to lend their aid to purposes like this."

And upon this broad principle ***ex turpi causa non oritur actio***, the district court properly refused to carry out the illegal contract. But, insist the appellants, if the agreement of partnership was unlawful and immoral, "the purpose of such partnership must also be admitted to be accomplished and executed, and the proceeds should be divided as agreed upon by the partners." The opinion examines the case of Sharp v. Taylor, 2. Phil. Ch. 810, cited by plaintiff, and also the criticism on the opinion of Lord Cottenham in that case by Jessel, M. R., in Sykes v. Beadin, 11 Ch. Div. 170; also the case of Armstrong v. Foler, 11 Wheaton, 258, in which Marshall, Chief Justice, said that a subsequent collateral or independent contract, founded on a new consideration, not immoral or illegal, is not contaminated by the original illegal agreement." But the court holds the principle of these authority does not apply. The same is said of Brooks v. Martin, 2 Wall. 70, and approves the distinction made by the Supreme Court of North Carolina, in King v. Winants, 71 N. C. 472, and by the Supreme Court of Massachusetts,

Snell v. Dwight, 120 Mass. 9, in both of which cases each of said courts "decided that they would not examine into, settle up and enforce an illegal contract between the parties to it. Citing further Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. Ry. Co., 61 Fed. 993. The court then proceeds thus: "The New York court of appeals in Woodworth v. Bennett, 43 N. Y. 273, restate the general rule as laid down by Mullet, J., in the earlier case of Gray v. Hook, 4 N. Y. 449, as follows: The general rule on this subject, as laid down by this court in Gray v. Hook, 4 N. Y. 449, as follows: The distinction between a void and a valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecutive provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the *first class* of cases, *no change in the form of a contract will avoid the illegality of the first consideration, while express promises based upon the last class of consideration may be sustained*" It is unnecessary to go further. By the evidence here offered for plaintiffs, they seek to *enforce directly* an immoral contract, and to secure the fruits of such a contract. It cannot be done. Plaintiffs are entitled to little sympathy. They *knowingly entered into the contract*, and are only suffering the consequences of a dishonest transaction in which they united and which they prove in presenting their case. The fault of the parties being mutual, they can only rely for a share of profits upon that sentiment of honor which one of them wrote would exist when they entered into the immoral combination. Being *in puri delicto*, we apply the maxim, *Potior est conditio possidentist.*

Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. Ry. Co., 61 Fed. Rep. 993.

This was a case where several railroad companies entered into a pooling contract by which it was agreed

that all of the business should be apportioned among the roads, each to do a certain part and receive compensation, or the entire earnings should be paid into one pool and each company be entitled to a certain share. The contract was performed in part, when one of the parties demanded his share of the fund earned and payment was refused. That company sued for its share. The court held the contract void as against public policy, and refused to enforce it. The case was decided by the United States circuit court of appeals of the eighth circuit, May, 1894, Caldwell and Sanborn, circuit judges. "But (say the court), conceding that the contract is illegal and void, the appellant asserts that it has been performed, and that the appellee is bound to account for moneys received under the contract according to its terms. This contention rests on a misconception of the character of this suit. The appellant's claim is grounded on the illegal and void contract, and this suit is, in legal effect, nothing more than a bill to enforce specific performance of that contract." . . . The case of Brooks v. Martin is not in point. In that case the defendant set up an illegal contract, which had been fully performed and executed, as a defense against a demand that existed independently of the contract; whereas in this case the ***illegal contract*** is set up by the ***plaintiff*** as the foundation of its action. Strike this contract out, and confessedly the complaint states no cause of action; leave it in, and it states an illegal and void cause of action.

Courts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight their own illegal action has placed them."

The rule applied in this case is controlling in the case at bar. It may be that the statement of the court that the contract set out shows on its face an illegal and void cause of action, does not apply in terms to the contract men-

tioned in complainant's bill. This is so because an agreement honestly made and lawfully carried out, to act jointly in performing the work of executing the contract which had been awarded to Hoffman & Bates, was not illegal. The bill states only so much of the agreement as makes it appear to have been honest and legal; but the evidence shows that the pleader has not stated the real facts. He has omitted all that show the illegality. But this the evidence supplies. Under such circumstances, while the facts as stated in the bill might not render it demurrable, still, on a final hearing upon the evidence the facts disclose a condition just as fatal to the plaintiff's case as though he had stated the whole truth, and by so doing had plead himself out of court, as was done in the case last cited.

The principle announced in ***Tool Company v. Norris, 2 Wall 4***, is directly in point upon the proposition, that the law looks to the tendency of acts alleged to be against public policy, rather than to the fact that harm has actually resulted or was intended, to determine the validity of such acts.

To the same effect is the case of ***Trist v. Child, 21 Wall 449***.

The Supreme Court of the United States, speaking through Mr. Justice Swayne, says, p. 448: "It is a rule of the common law of universal application that when a contract, express or implied, is tainted with either of the vices last named, as to the consideration of the thing to be done, no alleged right founded upon it can be enforced in a court of justice." Among the cases enumerated by the court to which this rule applies are "An agreement . . . to pay for not bidding at a sheriff's sale of real property; to pay for not bidding for articles to be sold by the government at auction; to pay for not bidding for a contract to carry the mail on a specified route; to pay for securing a contract from the government"; and many other cases.

Smith v. Applegate, 23 N. J. L. 352.
Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 663.
Oscernagun v. Arms Co., 103 U. S. 261, 274.

If it were conceded that the agreement signed by McMullen and Hoffman on the 6th of March, 1893 (Piff. Ex. 1), was new, it would be of no avail to McMullen, for the evidence shows that it is based upon, grew out of and is directly connected with the illegal agreement entered into by the parties long prior to date of its execution, and under which the contract of the city with Hoffman & Bates of March 10, 1893, was obtained.

In Comstock v. Draper, 53 Am. Dec. 18 (1 Mich. 481), the court say (p. 80): "It is a well-settled doctrine of the English-American books that an illegal transaction cannot constitute a good consideration for a promise. If the connection between the original illegal transaction and the new promise can be traced, if the latter is connected with and grows out of the former, no matter how many times and how many different forms it may be removed, it cannot form the basis of a recovery, for repeating a void promise cannot give it validity."

Ray v Mackin, 100 Ill. 246.

One of the streets in Chicago was to be paved. Rival contractors sought the work. An agreement was finally reached between the contractors, and one of them withdrew from the contest. The contractor who withdrew urged those who had acted with him to transfer their support to the other contractor; and at a meeting of a committee of the property-owners to consider and determine upon the matter, the same contractor wrote out a bid for himself and a lower bid for the other contractor, according to agreement beforehand. In an action to recover upon the agreement made by the contractor who secured

the contract, to pay the other contractor a certain sum out of the profits of the job, it was held that the agreement sued upon, taken in connection with its consideration, was against public policy and a fraud upon the persons who were to pay for the improvement of the street, and therefore formed no valid foundation for the action. The testimony showed that the contractor, long after the work was done, promised to pay the amount.

Morris Run Coal Co v. Barclay Coal Co., 68 Pa. St. 173.

At p. 188 the court say: "A second question is, whether the bill drawn in this case by the general sales agent of the Barclay Coal Co, in favor of the Morris Coal Co. to equalize prices upon the settlement under the contract is such an independent cause of action as will support the suit. When a bill, note or bond is but an instrument to execute an illegal contract, it is tainted by the illegality, and cannot be recovered. The illegal consideration enters directly into the instrument, and is followed up because the law will not permit itself to be violated by *mere indirection* . . . The present case is free from difficulty, the money represented by the bill arising directly upon the contract to be paid by one party to another party to the contract in execution of its terms. The bill itself is therefore tainted by the illegality, and no recovery can be had upon it."

Gray v. Hook, 4 N. Y. 449.

At p. 459 the court say: "The distinction between a void and valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract; or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases no change in the form of the contract will avoid the illegality of the first consideration, while express promises based upon the last class of consideration may be sustained. Mr. Chitty

says the test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires any aid from the illegal transaction to establish his case."

Meguire v. Corinne, 101 U. S. 108.

This case was based upon an agreement entered into to secure the appointment of a certain person as special counsel for the United States.

Mr. Justice Swayne says (p. 111): "The law touching contracts like the one here in question has been often considered by this court, and is well settled by our adjudications"—16 How. 314; 2 Wall. 45; 21 Wall. 441; 1 Wall. 542. . . .

"In Trist v. Child (supra), while recognizing the validity of an honest claim for services honestly rendered, the court said: But they are blended and confused with those which are forbidden; the whole is a unit, and indivisible. That which is bad destroys that which is good, and they perish together. . . . Where the taint exists it affects fatally in all its parts the entire body of the contract. In all such cases, *potior conditio defendentis*. Where there is turpitude, the law will help neither party."

The alleged new "agreement" upon which plaintiff rests his right to recover is not only based upon and grows directly out of the illegal contract, but it directly appeals to the court to aid in the execution of both.

Plaintiff would have no case without the aid of the contract with the city. It is that which he relies upon to show what he claims is his due. The alleged new agreement was entered into for the purpose of executing that contract, and for no other purpose. Plaintiff makes a direct appeal to the court to take the execution of that contract out of the hands of Hoffman, place it in the hands of a receiver, and direct him to complete it and collect the money for the services performed. This is the identical work to perform which the parties entered into the alleged new agreement. Under the authorities last cited, such

new agreement would be as illegal as the original, and no action would lie to enforce either.

The law leaves parties to illegal contracts as it found them.

Bartle v. Coleman, 4 Pet. 187.

This case is a contract made by the complainant with a public agent, a deputy quartermaster-general, and an amount exceeding $50,000, in the profits of which he was to participate, etc. Mr. Justice Baldwin (p. 188) says: "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a and deeply practiced fraud, which, when detected, deprives *particeps criminis*, it is a just infliction for a premeditated him of anticipated profits or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers by shifting the loss from one to another, or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of law."

Dent v. Ferguson, 132 U. S. 50-66.

Meguire v. Carnine, 101 U. S. 108.

Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 663.

Miller v. Davison, 3 Gillman, Ill. 518; 44 Am. Dec. 715.

Caton, J. (p. 717, Am. Dec.): "No principle is better settled than that where two or more persons embark in an unlawful transaction, and one get the advantage of the other and appropriates more than his proportion of the spoils to himself, the court will not interfere to make him divide with the others. As they commenced with the violation of the law, they cannot invoke its aid in any way. The law will not meddle with gains obtained by its own outrage as between those who have been engaged in trampling it under foot. This, however, is not out of regard to the one who claims immunity from having violated the law, but it is because he who complains is equally

guilty." In the case of Holman v. Johnson, Cowp. 343, Lord Mansfield says: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, seems at all times very ill in the mouth of the defendant. It is not, however, for his sake that the objection is ever allowed, but it is founded in general principles of policy, and whenever from the plaintiff's own stating, or otherwise, the cause of action appears to arise from the transgression of a positive law of the country, he has no right to be assisted." "This is a defense which the guilty is allowed to set up against his associate in guilt, as a sort of punishment for the participation of the latter in the violation of the law. It is the guilty, and not the innocent, which it is the policy of the law to punish."

From the evidence in the record the following conclusions must necessarily be reached:

First—That in 1891 McMullen, representing the San Francisco Bridge Company, and Hoffman, doing business in the name of Hoffman & Bates, were competent and qualified bidders for the work in contemplation, to provide the city with water, and at that time they entered into an agreement to act together in obtaining and performing any contract they might secure with city, each agreeing to get all the information he could about the work, its cost, etc., and each to furnish one-half the money required to perform any contract they might secure, and to share equally any profits or bear any losses which might result.

Second—That they also *secretly* agreed that while they were to be interested alike in any contract which might be obtained, and (the contracts were to be let upon sealed proposals to the lowest bidder) they would not present to the water committee, who had charge of the letting for the city, bids signed by them jointly, thus showing themselves to the committee as joint bidders and jointly interested in any contract which might be obtained, but would bid separately, one in the name of the San Francisco

Bridge Company and the other in the name of Hoffman & Bates.

Third—That they *secretly* agreed that each should submit to the water committee bids for the several classes of work to be done and materials to be furnished, and they further *secretly* agreed that the bids so submitted should be so arranged as not to compete with each other.

Fourth—That in pursuance of this agreement McMullen presented to the water committee, in the name of the San Francisco Bridge Company, proposals, and Hoffman presented to the committee proposals as follows:

HEADWORKS.

San Francisco Bridge Company	$16,550 00
Hoffman & Bates	17,800 00

BRIDGES.

San Francisco Bridge Company	$31,279 07
Hoffman & Bates	33,562 94

STEEL CONDUIT FROM HEADWORKS TO MT. TABOR.

San Francisco Bridge Company	$348,781 00
Hoffman & Bates	359,278 00

Conduit from headworks to Mt. Tabor of steel or wrought iron, making and laying of pipe.

San Francisco Bridge Company	$514,664 00
Hoffman & Bates	$465,722 00

SUBMERGED PIPE.

San Francisco Bridge Company	$97,340 00
Hoffman & Bates	No bid.

Each of said bids was accompanied by a certified check for 5 per cent. of the amount of the bid.

Fifth—That all these bids were seen by both parties before they were deposited with the committee, and were *secretly* arranged by the mutual agreement of both. That the bids for manufacturing and laying pipe were changed by the mutual agreement of Hoffman and McMullen and increased many thousands of dollars above what the engineers of the parties showed the work could be done for at a fair profit.

Sixth—That the bids for manufacturing and laying and for furnishing the plates were arranged by the same parties with a view to having the bid of the San Francisco Bridge Company for the plates withdrawn and that of Hoffman & Bates, which was over $10,000 higher, substituted in case the proposals of other bidders should fall in such a manner as to make such arrangement practicable.

Seventh—That on every item upon which both parties bid, the lowest bid was the one which had been jointly agreed upon, and in which both were interested, and all others were not deposited in good faith, but as mere matters of form, and intended to mislead the committee.

Eighth—That at a former letting in 1887 McMullen, in the name of the San Francisco Bridge Company, was the lowest bidder, and the San Francisco Bridge Company was the lowest bidder on every item upon which both parties bid at the letting in 1893, except the items of manufacturing and laying the pipe. This bid of the San Francisco Bridge Company was $48,942 higher than the bid of Hoffman & Bates, which McMullen and Hoffman had *secretly* agreed the contract could be safely taken and performed for.

Ninth—That the contract was awarded to Hoffman & Bates on Hoffman's bid of $465,722.

Tenth—That under the *secret agreement* between McMullen and Hoffman, the contract for manufacturing and laying the pipe was to be, and was, awarded in the name

of Hoffman & Bates, and a contract to perform the work was to be entered into in the same name with the city of Portland through the water committee, but it was *secretly* understood and *secretly* agreed that the contract should be in fact the property of McMullen and Hoffman, and was to be performed by them, the expenses to be paid, the losses borne and the profits divided equally between them, all of which had been agreed upon long before the bids had been submitted, and in pursuance of which all actions of the parties had been taken to procure the contract, and in its performance up to September 16, 1893.

Eleventh—That on the 6th day of March, 1893, McMullen and Hoffman reduced to writing the portion of the original agreement of 1891 which had not been performed in procuring the contract with the city, and for the purpose of evidencing the interest that each of the parties had in the contract which had been awarded in the name of Hoffman & Bates, and signed their names to the same.

Twelfth—That based upon the bid of Hoffman & Bates and the award of the contract thereon, on the 10th day of March, 1893, the city entered into a contract with Hoffman & Bates, in which Hoffman & Bates agreed to perform the work of manufacturing and laying the pipe as specified in their bid.

Thirteenth—That the water committee was without any knowledge or notice whatever of any agreement or understanding between McMullen and Hoffman that they were jointly concerned in procuring contracts from the city, or that they were partners in the bids which had been submitted or were partners in the contract let in the name of Hoffman & Bates, and had no notice that McMullen and Hoffman were ever jointly interested until this suit was commenced; but, on the contrary, the water committee supposed and believed that the bids submitted by McMullen in the name of the San Francisco Bridge Company, as

well as those submitted by Hoffman in the name of Hoffman & Bates, were all ***bona fide*** bids, and that both parties were ***bona fide*** bidders, each honestly endeavoring to secure a contract upon the bid submitted by him. That the committee understood and believed the said bidders to be what they appeared on the face of their bids to be—competing bidders.

The facts thus clearly proven show that McMullen and Hoffman entered into the secret combination for the purpose of preventing competition, at least between themselves; but in order to prevent the fact being known to the committee, they not only kept it a profound secret, but represented to the committee by the most conclusive evidence—their separate bids—that they were in fact competitors. This representation was a falsehood, a fraud, the natural tendency and effect, and in this case the purpose, of which was to mislead and deceive. ***An agreement to pursue such a course is void, as is also any contract with the city procured by such means, and the courts will not aid in enforcing them.***

The learned judge, who presided at the trial at the circuit, stated the rule clearly and forcibly as applicable to such facts when he said (R., p. 71): "Upon all the cases cited or to be found, and in any view of the case consistent with public policy and the principles of equity, there can be no relief in such a case." Judge Hawley, delivering the opinion of the Circuit Court of Appeals, uses this language (R., p. 605): "In the present case it is evident that McMullen and Hoffman understood each other; that their intention was to prevent open competition, which the law encourages. In their confederacy they were aiming at the same result—that of compelling the city to pay a higher price for the work than McMullen believed it was worth." The same judge says (R., pp. 606-7): "The dividing line is always sharply drawn with reference to the particular facts of each case, and the conclusion reached that where the

parties have acted openly and honestly and entered into an agreement which neither in its purpose, effect or natural tendency is to prevent fair competition, it can be and should be enforced. But when there is a secret combination—call it partnership or any other name—the effect of which is, or the natural tendency of which is, to abate honest rivalry or prevent fair competition, it is to be, and is, condemned as violative of public policy, and held to be absolutely void. All the authorities hold that where either the intention, the effect or the necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy, and, when it is discovered, will be stamped with marks of disapproval in any court of law or equity." Who will say that this is not a correct statement of the rule of law applicable to the cases supposed, and who will say, if the facts were correctly found by the Circuit Court of Appeals, that the rule of law just stated is not correctly applied? Certainly no one, and therefore the writ which brought this record to this court could not have been based upon any error of the Circuit Court of Appeals in its findings of fact upon this branch of the case, or in applying the law to them. The decree of the Circuit Court of Appeals must, then, be affirmed unless error was committed in respect of some other phase of the case.

The case of the defendant is made out, and unless the plaintiff presents reasons for taking it out of the operation of the rule which so plainly applies, and which leaves the parties where it finds them, the decree of the Court of Appeals must be affirmed.

Counsel for plaintiff claim that such reasons exist and what they are claimed to be is stated in full in their brief. It is not deemed necessary to examine them in detail; a few only will be noticed.

One contention of the plaintiff is, that the acts of McMullen and Hoffman in procuring the contract are in all respects correct, proper, upright, honest and honorable;

that the agreements originally entered into between the parties to secure control and perform work for the city, and the contract of the city in the name of Hoffman & Bates are wholly free from any taint of fraud or illegality. If this contention is true, there is an end of this branch of the case. But the facts in the record, and the authorities cited in this brief, plainly negative this contention.

Another ground upon which it is claimed the effect of the unlawful conduct of McMullen and Hoffman in securing the contract from the city may be avoided is, that if it be admitted that the partnership agreement entered into between the parties in 1891 to secure contracts for this work and to execute them and share the profits were illegal, and that the contract of Hoffman & Bates with the city was void for the same reason, all this was cured by the execution of the writing which was signed on the 6th of March, 1893, after the contract had been awarded to Hoffman & Bates, and thus all the acts of the parties prior to that date were "no more than the advancement of a legal contract of co-partnership." I suppose this statement is based upon the assumption that the agreement of March 6 is a new and independent agreement of co-partnership wholly disconnected with the illegal agreement and acts by which the contract with the city was secured. This contention is not supported by the facts, nor has it the support of any legal principle. It is not necessary to repeat here the evidence, to which the attention of the court has already been directed in this brief (60 to 70 supra), to show that the writing of March 6, 1893, is in no sense whatever a new agreement. It is a mere repetition of what was agreed upon between the San Francisco Bridge Company, through its manager, Mr. Catt, and Mr. Hoffman, for Hoffman & Bates, in 1891. (R., pp. 151, 152, 153, 154.) It simply reduces to writing what was left unexecuted of that agreement, what was left to be done after the con-

tract had been secured. The agreement to secure a contract and perform it was one and indivisible. The act of reducing a portion of it to writing did not change its character as a unit. The thing agreed to be done was the identical thing the original agreement was formed to do, and upon identically the same terms. The original agreement was that they would perform a contract if they got it and would divide the profits if there were any. They would have done the same thing, and would, under their *secret* agreement, have had the same right to and interest in the contract with the city without the written agreement as with it, and the plaintiff in his complaint alleges that the writing is executed to "evidence" the interest of the parties in it, not to convey any interest not already owned by either. The writing itself does not pretend to do more. Counsel has enumerated the provisions of the alleged new agreement in his brief (p. 63). First—That Hoffman and McMullen shall share equally in the contracts awarded on the bid of Hoffman & Bates. Second—That each will furnish and pay half the expenses. Third—Each will receive half the profits or bear and pay half the losses. Fourth—That they will share equally in any other contract which may be secured for any other work from the city connected with this water system. (See dep. of Catt, R. 152 to 154.)

The further testimony of Mr. Catt, found on pages 153, 154, 155, shows that a large amount of work was done by himself and his assistants in carrying out the agreement entered into with Hoffman in 1891, to secure the work of constructing the Portland water works. So well was it understood that the parties were in actual partnership in this work that his correspondence concerning the same was addressed to "Lee Hoffman and J. McMullen, of Portland, Oregon." This testimony is offered by the plaintiff, and shows the facts as they actually existed. It removes all doubts and shows that the writing signed by McMullen

and Hoffman on the 6th of March (plff. ex. No. 1) was in no sense a new agreement. That no new partnership was founded upon or created by it, but it was, as has been so often stated, a mere reducing to writing of an agreement, partnership, or what you will, which had been as effectually performed in part as was the work done after the writing was signed, in completing the contract with the city. This state of the facts entirely disposes of any claim of the plaintiff that avoids the effect of the fraud and illegality of the acts by which the contract with the city was obtained by having entered into a new contract purged of the illegality of the original.

In support of their contention, counsel for the plaintiff make what seems to me a most remarkable claim. (Plff. brief, pp. 62, 63): "But, granting for the argument respondents' contention in regard to the character of their acts in submitting bids, it was no more than the performance of an illegal act in the advancement of a legal contract of co-partnership?" This contention amounts to this: If McMullen and Hoffman formed a partnership for a purpose not forbidden by law or public policy it is wholly immaterial what methods they adopt to accomplish the purposes of the partnership. To illustrate, McMullen and Hoffman entered into a co-partnership to be joint bidders at the lettings for the work of building the Bull Run pipe line. Such a partnership, if honestly entered into and legally carried out, is not unlawful. But for the purpose of securing a contract with the city, instead of bidding, as they might legally have done, in their joint names, openly and honestly presenting themselves to the city in their true character, they kept their partnership agreement *secret* from the city, deposited bids in their several names, and assumed to the city the character of competing bidders, exhibited their respective bids to each other, and purposely so arranged them

that they should not be competing; all of which acts are illegal, but as a result of them a cantract was secured with the city. It will not be disputed, I take it, that a contract so obtained by the same persons, if not co-partners, would be absolutely void. But counsel for the plaintiff seem to have discovered some magic in the fact of this partnership relation which makes it valid. Such a result is impossible. The statement of the proposition condemns it. It cannot be successfully denied that practices such as this record discloses on the part of McMullen and Hoffman are, in the language of Mr. Justice Swain, in Maguire v. *Corwine, 21 Wall. 108, 111*, "an unmixed evil." The law as laid down in that case is that such acts, "whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source."

In Trist v. Child, 21 Wall. 441, while recognizing the validity of an honest claim for service honestly rendered, this court said: "But they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. . . . Where the taint exists it affects fatally in all its parts the entire body of the contract. In all such cases *potior condition defendentis*. Where there is turpitude the law will help neither party. These remarks apply here. The contract is clearly illegal, and this action is brought to enforce it." If any authority were needed this is conclusive against the contention of the plaintiff. For the purposes of the illustration it is assumed that the contract between McMullen and Hoffman was honestly entered into, but the record shows no facts upon which such an assumption can rest. The entire correspondence between McMullen and Hoffman shows that they never once dreamed of dealing honestly with the city, but on the contrary this correspondence shows nothing so plainly and directly as a deliberate purpose to defraud the

city by "selling out" to other bidders (McM. to H., Jan. 26, R. 519), frightening others from bidding (McM. to H., Feb. 8, R. 522), forming pools to keep down competition (H. to McM., Jan. 22, R. 563), and "pulling" the water committee (McM. to H., March 8, R. 526; McM. to H., Dec. 31, R. 518), or corrupting this clerk by "taking him into our camp" (McM. to H., Aug. 4, R. p. 557) and inducing him to "return bids unopened." Yet all this is not cured, but concealed by the ingenious covering of a co-partnership, under which plaintiffs' counsel claims the right to recover. Much is said in plaintiffs' brief upon the distinction between a partnership and a contract for a partnership; the making of an agreement and the *launching* of the partnership. The only notice which need be taken of this contention is this: Plaintiff, in his bill, sets out the alleged agreement of March 6, 1893, as the foundation of the alleged partnership upon which he, in part, bases his right to recover. The writing itself more effectually acknowledges that the partnership under which he claims had already been formed and launched than that it creates a new one. It recites that the contract with the city had been secured in the name of Hoffman & Bates by the *aid and assistance of McMullen*, and what this aid and assistance was, and how it came to be rendered, is fully and plainly stated by Mr. Catt in his deposition and in the testimony of Mr. McMullen himself, which has been heretofore set out in this brief. The writing suggests *no partnership* beyond describing the joint interest which the partners have in the contract, which has been secured by their joint efforts, and is a repetition of the agreement of 1891. The agreement for joint action between these parties was made in 1891, and if a partnership it was *launched* the moment the parties to it began its execution by taking steps to secure the work, and continued until the 16th day of September, 1893, when dissolved by Hoffman, and was in no

material respect affected by the writing which was signed on the 6th of March, 1893. So all these nice distinctions and hair-splitting speculations which counsel for the plaintiff have, with so much learning and industry, presented to the court, seem to me to be wholly irrelevant and immaterial. If the contracts which this suit is brought to enforce are illegal by reason of the unlawful methods adopted by McMullen and Hoffman, all the laws relating to partnership ever dreamed of cannot render them valid.

One phase of this partnership relation which counsel for plaintiff presents with much apparent candor as sufficient to remove the effect of the fraudulent acts of the parties, and which renders the contracts he sues on void, is the agency which, it is said, the law casts upon every member of a partnership in his relation to other members, so far as the partnership business and property are concerned. This agency of partners is insisted upon for the purpose of invoking the aid of a rule of law to the effect that if money is paid to one of two parties to an illegal contract in which both are equally interested, but which, on account of its illegality, cannot be enforced in a court of law, if the party to whom the money is paid makes said express promise to pay the other his share, this promise may be the foundation of an action upon which a recovery may be had. The reason is that the express promise, and not the illegal contract, is the foundation upon which the action to recover rests.

Counsel for the plaintiff therefore asserts, first, that Hoffman, being a partner of McMullen, was his agent, and that money paid to Hoffman for the partnership was received, one-half for himself and the other half for McMullen. His next claim is that the partnership relation raises an implied obligation on the part of Hoffman to pay to McMullen his half of any profits which might result from their contract with the city. He then argues thus:

Hoffman and McMullen are partners in the performance of the contract with the city. Profits resulting from the work which have been paid to Hoffman. One-half of the money so received by Hoffman was received by him as the agent of McMullen because he was a partner, and the law raises an implied promise on the part of Hoffman to pay to McMullen his share. Now, for the sake of the argument, counsel for the plaintiff admits that the contract of partnership, as well as the contract with the city, were illegal as against public policy and could not be enforced at law. But he says the money having been paid to Hoffman and the law making it his duty to pay it over, there is an implied promise by Hoffman to pay it to McMullen, and that takes the case out of the operation of the rule which would prevent McMullen from recovering the money upon the contract itself. This contention cannot possibly be maintained. It is based upon the claim that the receipt of the money by Hoffman and the implied obligation to pay over created a new contract, independent of the partnership agreement, which, for the sake of the argument, is conceded to be invalid. The rule is stated in *Gray v. Hook, 4 N. Y. 449* in this: "The distinction between a void and valid new contract of relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract; or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced at law, and upon the performance of which the law will raise no implied promise. In the first class of cases no change of the form of the contract will avoid the illegality of the first consideration; while *express promises* based upon the last class of considerations may be sustained." The case admitted by the plaintiff for the purpose of the argument comes within the last class, "the execution of an agreement which could not be enforced by law, and for the performance of which the law will raise no implied promise."

Under this authority, as well as upon the reason of the proposition, there was no implied promise which the law raised between McMullen and Hoffman, because the contract between them is illegal; but the authorities say that notwithstanding the law will raise no implied promise upon such an agreement, still if the party who has received the money in which the other party had an equitable interest, which might be enforced at law but for the illegality of the contract, an express promise by the party who received the money, to pay it to the other might be sustained upon the *consideration* of the equity which the party to whom the money was to be paid, had in the fund. There is no allegation in the bill, and not a syllable of proof in the record, that Hoffman ever promised to pay McMullen a farthing. So that the entire contention of plaintiff's counsel that the law raised an implied promise on the part of Hoffman to pay money to McMullen is wholly without foundation. It seems to me that counsel's reasoning would come to this: An illegal contract of partnership has been entered into between Hoffman and McMullen; on account of its illegality neither party can have the aid of the court to enforce it, yet, although it is void for all the purposes which are expressed in it, and cannot be enforced, it is nevertheless valid for the purpose of creating a legal liability by one party to the other, or, in other words, to create a new contract between the parties which the law will enforce. I take it that if this agreement or pretended agreement between Hoffman and McMullen is void for illegality for one purpose so that it cannot have the aid of the court to enforce it in one respect, it is equally void in all other respects. In other words, if this contract, by reason of being obtained by illegal means, cannot have the aid of the court to compel Hoffman to account to McMullen, it cannot be brought into court and made the basis upon which the court will rest an implied promise on the

part of Hoffman to pay money to McMullen. It must be remembered that the record does not show that when the money was paid to Hoffman by the city, the city had any knowledge whatever that McMullen had any interest in it. There is no testimony tending to show that McMullen or Hoffman ever notified the city of their partnership, but the whole of the evidence upon that subject shows that the city, through its water committee, entered into the contract with Hoffman & Bates, knew them, and only them, as the persons who were entitled to receive compensation for the work done, and the only evidence that McMullen had any interest whatever in such money was the private agreement between himself and Hoffman. It cannot, therefore, be said that the city paid the money to Hoffman for McMullen's use, but paid it to Hoffman for his own use, and McMullen's claim upon it rests solely upon the secret agreement which counsel, for the sake of argument, admits to be invalid. Another matter in this connection, I think, may be properly stated. The bill of complaint in this case sets out the substance of the contract of Hoffman & Bates with the city and the alleged agreement between Hoffman and McMullen. These two contracts are made by the plaintiff's complaint the basis of this suit; are shown not to have been performed, and he prays the court to complete them and settle up the business between the parties. There is no allegation of any right to recover upon the basis of any new contract. No allegation of any right to recover upon any promise made by Hoffman to pay McMullen. The position now taken by the plaintiff upon this phase is to abandon the case he makes in his pleadings, and undertake to enforce his claim upon the basis of a new promise not stated in his complaint and wholly inconsistent with the cause of suit set forth in the pleadings.

The plain truth is that if this contract is illegal and

cannot be enforced for that reason, there is no evidence in the record upon which to base a claim that a new promise was made by Hoffman upon which a recovery can be had. On the other hand, if the testimony in the case fails to show that the contract is illegal, then the court will enforce it according to its terms, and all this exceeding refinement to which counsel has resorted in his brief to find a pretext upon which he hopes to avoid the illegality is labor lost.

In his brief, page 78, plaintiff's counsel quotes from the opinion of the Circuit Court of Appeals this language: "If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. (Hanks v. Baber, 53 Ill. 292; Chase v. Trafford, 116 Mass. 532; 1 Am. and Eng. Ency. of Law, 2d Ed., 437.) But it does not appear that any such admission has been made. No promise had been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought." Referring to these remarks, counsel for plaintiff uses this language: "This concession carried with it an unqualified admission of McMullen's right to recover in this suit, for the simple reason that an implied promise is as effectual in law as an express one, and the very receipt of the money by Hoffman raised an implied obligation on his part to pay over to McMullen his half of it. Where money is received by one to the use of another it does not require an express admission or promise from the depositary to enable the beneficiary to recover."

This language of counsel shows a most complete misconception of the statement made by the Circuit Court of Appeals, and of the law applicable to the condition of things to which the language of the court refers. The court referred to a contract which was illegal and could not be enforced at law. One which raises no implied prom-

ise for any purpose whatever, because it is void. The court assumes that McMullen had an equitable interest in the money paid to Hoffman, but in consequence of the illegality of the contract out of which that equity arose, McMullen could not recover against Hoffman his interest. But, say the court, if Hoffman had promised expressly to pay McMullen, the equitable interest of McMullen in the fund would have been a sufficient *consideration* to support the promise. Counsel for the plaintiff, wholly ignoring this feature of the proposition, proceeds upon the assumption that the court was treating the contract between Hoffman and McMullen as valid; one which might create an equitable obligation on the part of Hoffman to McMullen, and yet void when McMullen attempted to enforce it at law. The difference between counsel and the court is, the court was speaking of a contract which was void, but that an equity might grow out of it which would support an express promise which a court of law might enforce, while counsel states the principle applicable to a valid contract which may be enforced without the aid of any new promise.

Counsel cites a number of cases which he claims support the theory he advances, but which I do not regard as necessary to notice, for the simple reason that if the contracts which he is seeking to enforce in this suit are valid, then there is nothing for the court to do but to enforce them. If they are not valid, then they cannot have the aid of the court, and all the efforts of counsel to secure that aid must be unavailing. It is manifestly impossible upon the face of this record for counsel to show that the contracts sought to be enforced in this suit are not the identical, original transactions which, as we claim, the record shows are illegal. The writing signed by the parties on March 6 in no way changed the character of the original agreement. The principle applicable to the condition is laid down in Gray v. Hook, supra, thus: "Nor did the addition of an

honest dollar cure the illegality of the remainder of the consideration. When the contract grows immediately out of and is connected with an illegal or immoral act a court of justice will not lend its aid to enforce it; and if the contract be in part only connected with the illegal transaction, and grows immediately out of it, though it be in fact a new contract, it is equally tainted with the illegality of the contract from which it sprung." In Toler v. Armstrong, 4 Wash. C. C. 299, Washington, J., uses this language: "I understand the rule, as now clearly settled, to be, that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it."

Another ground upon which the plaintiff seeks to avoid the effect of the illegal contract upon which his suit is based is that "McMullen does not need the support of the matters urged by the respondent in defense of his suit, and the courts have no occasion to investigate these matters in arriving at a solution of the pending controversy." This contention would probably be true if the respondent had filed no answer to the bill. There is nothing on the face of either contract which would suggest its illegality, and if McMullen could have been left to simply state so much of the transaction out of which his claim arises as was favorable to himself, he might not have done what he probably did, state a cause of suit. But, in stating his cause, he sets out a contract with the city, which, though valid upon its face, is illegal and void when the facts and transactions out of which it grew are made known to the court. He sets up an agreement which he calls an agreement of partnership, which though valid upon its face is void for the same reason as above stated. The contract with the city is the basis upon which rests, and out of which grows, the fund which he asks the court to divide between himself and

Hoffman. All the transactions between the parties by which the money received by Hoffman was earned must necessarily be inquired into by the court, and it is altogether immaterial, so far as the duty of the court is concerned, whether these circumstances and transactions come before it by the pleadings or are established by the evidence. The court must inquire into the facts and must base its decree of distribution, if it makes any, upon the contract with the city. The plaintiff would have no basis for relief if he did not show that profit had resulted from the execution of the contract between the city and Hoffman & Bates in which he claims an interest; nor could he show any interest in himself if he had not alleged the facts which he claims are set out in his contract of partnership as the basis of his interest, and which he presents to the court for its guidance in determining the amount to which he is entitled. It is difficult to see how counsel can seriously pretend that he does not necessarily require the *aid* of these two contracts in order to make out his case. Strike out the allegations of his complaint relating to the contract with the city and that relating to his alleged partnership, and he will have no cause of suit. And if the validity of these agreements had not been assailed by the respondent the court would still have been obliged to call them to its aid for the purpose of determining the interests of the parties in settling the alleged partnership. Counsel now contends that having made a case by his pleadings which would entitle him to recover without disclosing the illegality of the contract upon which he bases his right to recover, that that is the end of the matter and that the respondent has no right to assail the validity of these contracts, either by his pleadings or by his proof. He excepted to the answer at the trial at circuit and attempted to eliminate from it all the allegations showing the illegality of the contracts pleaded. The circuit judge overruled

these exceptions. Counsel for the plaintiff objected to all evidence offered by the defendant to support the allegations of the answer in this regard. It would seem to be an easy way to try a lawsuit if counsel's contention is correct, if it is true that when he stated a case upon the face of his record, the opposing party should neither have the right to plead or prove any facts which would defeat his right of recovery. Of course, no such rule obtains in any court. The defense in this case presented by the respondent, that the contracts described in the complaint are void as against public policy is not a defense which is countenanced by the courts out of any consideration for the defendant or for either party to the controversy. It is a defense which is addressed to the court in the interest of the public, of the law and its proper administration. It is indeed a defense which, in a case like this may, it may be said in the language of Lord Mansfield, in the case of Holman v. Johnson, Cowp. 343: "The objection that a contract is immoral or illegal as between the plaintiff and defendant seems at all times very ill in the mouth of the defendant. It is not, however, for his sake that the objection is ever allowed, but is founded on general principles of policy, and whenever, from the plaintiff's own stating, *or otherwise*, the cause of action appears to arise from the transgression of a positive law of the country, he has no right to be assisted." In Miller v. Davidson, 44 Am. Dec. 715 (3 Gilman, 518, Ill.), Caton, J., delivering the opinion of the Supreme Court of Illinois, says: "No principle is better settled than that where two or more persons embark in an unlawful transaction and one gets the advantage of the others and appropriates more than his proportion of the spoils to himself the court will not interefere to make him divide with the others. As they commenced with a violation of the law they cannot invoke its aid in any way. The law will not meddle with gains obtained by its own outrage between those who have been engaged in trampling it under foot. This, however, is not out of regard to the one who claims immunity from having violated the law, but it

is because he who complains is equally guilty." Then, after citing the language of Lord Mansfield above quoted, the court proceeds: "This is a defense which the guilty is allowed to *set up* against his associate in guilt as a sort of punishment for the participation of the latter in the violation of the law. It is the guilty and not the innocent which it is the policy of the law to punish."

In Coppell v. Hall, 7 Wallace, 542, the court, having under consideration the validity of a contract alleged to be illegal, Mr. Justice Swayne, delivering the opinion of this court, says: "The instruction given to the jury that if the contract was illegal the illegality had been waived by the reconventional demand of the defendant, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but for the law itself. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reason. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." Collins v. Blantern, 1 Smith's L. C. 630, and notes. In Crichfield et al. v. Bermudez Asphalt Paving Co., Supreme Court of Illinois, October 24, 1898, 21 N. E. 522, the court had occasion to consider the validity of an illegal contract. The question of its invalidity, however, was not raised by the pleadings. In delivering the opinion of the court, Magruder, J., says: "It is urged that the question of the invalidity of this contract is not raised in the court below, nor by objections to the introduction of evidence. Where a contract is in terms *contra bonos mores* it is not necessary for the defendant to plead the objection. A court will not proceed to judgment upon it,

even if both parties assented thereto. In such cases there can be no waiver. The defense is allowed not for the sake of the parties but for the sake of the law itself." The court then quotes the passage from the opinion of this court in Coppell v. Hall, 7 Wall., above quoted; and then says, at page 558: "If the objection is not made by the party charged, it is the duty of the court to make it on its own behalf. Courts owe it to public justice and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy, by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court *whenever* and *however* the character of the contract is made to appear." Morrill v. Nightingale, 93 Cal. 452.

In Gravier v. Carrabys Ex'r., 17 La. 132, where the objection that an agreement was contrary to public policy had not been raised in the court below and it was urged that the upper court could not consider it, the supreme court of Louisiana says: "Where an exception is put in at the argument in the Supreme Court suggesting that the contracts between the parties to the suit are illegal, immoral and contrary to public policy, the court is bound to notice it, even without any plea; and in such case no recovery can be had."

This identical question came before the Supreme Court of New Jersey in the case of Hope v. Linden Park Blood Horse Association, decided June 16, 1896, and reported in 34 Atlantic, 1070. The question arose upon a contract which was claimed by the defendant to be void as against public policy. The court say, at page 1071: "The question now mooted is, whether the court will permit a party to such an agreement to show its corrupt and illegal character in defense of an action against him to recover money paid to him in pursuance of its terms. The trial judge thought that if one party to such an agreement should make out a *prima facie* case for recovering back money paid under it, without exhibiting the illegality, it would not be competent for the person sued, who had been party to the agreement, to show the illegality, and defeat such

recovery. The rule is that in an action in which either party to such a contract seeks redress from the other for his own benefit, he will be left by the court in the position in which he has placed himself." At page 1072, the court say: "It appears to me to follow from this view of the foundation of the rule with respect to illegal and corrupt contracts, that the policy which constrains the court to deny all relief to the parties, demand that where either of these parties shall offer to show that the cause springs from an illegal or corrupt agreement, the court shall admit and consider the legal proof offered to that end. It certainly does not further the salutary effect of the rule that neither party will be aided by the court, or satisfied, as to its impartiality, to exclude proof of some of the facts essential to show the entire transaction, and thus exhibit its illegality, merely because they are offered by a *particeps criminis* against whom a *prima facie* case is made by one equally corrupt, who has gained an advantage by presenting to the court garbled and partial proofs which suppress part of the truth, and impose a mutilated state of facts upon the court in place of the real transaction." 2 Kent's Commentaries, 467, Chancellor Kent says: "The courts of justice will allow the objection that the consideration of a contract was immoral or illegal to be made even by the guilty party to the contract; for the allowance is not for the sake of the party who raises the objection, but is grounded on general principles of policy." In 2 Starkie, 86, it is said: "Where the illegal consideration is set out upon the record, the objection may be taken either by demurrer or in arrest of judgment. But where it does not appear on the record the defendant may show that the claim is in reality founded upon an illegal and noxious agreement."

In Smith v. Applegate, 23 N. J. L. 352, which was a suit upon a promissory note, under a plea of the general issue, the defendants were permitted to show the illegality of the transaction, of which the giving of the note was a part. So in Nellis v. Clark, 20 Wendell, 24, in a suit upon a note, it was held that the defendant might produce proof of a like character. And a similar right in the defendant was

recognized in Harrison v. Hatcher, 44 Ga. 638; Inhabitants of Worcester v. Eaton, 11 Mass. 368, and Smith v. Hubbs, 10 Me. 71, 78.

In the greater number of cases cited the illegality of the contract was raised by the defendant. Even the case of Brooks v. Martin, 2 Wallace, 70, upon which plaintiff is disposed to almost entirely rest his case, the illegality of the transaction which it was claimed in that case would prevent a recovery, was set up by the defendant.

Counsel for the plaintiff has mistaken the principle which is laid down by the cases to the effect that a contract which may be remotely connected with an illegal contract may be enforced if it is itself legal, provided the aid of the illegal contract is not required. But this is not a question of the right to plead the illegality or to prove it if properly pleaded, but whether or not when pleaded and proved it shows that the party may or may not recover.

The authorities above cited show this to be the rule which would obtain in a case like the present, even if the illegality of these contracts had not been plead by the defendant. The plaintiff requires the aid of the contract with the city, as well as of his alleged partnership agreement, to enable the court to enter a decree in his favor upon the case which he makes in the complaint. It would have been entirely proper for the defendant, if, instead of setting out the fraud which vitiates this contract, he had simply denied the liability. He might have introduced all of this evidence under such a denial, and when the evidence which this record discloses came before the court, it would have shown so clearly and plainly that the contracts had been obtained by methods which rendered them void as against public policy, that the court would have been compelled, on its own motion, to have refused the relief prayed for and sent the parties out of court.

Counsel for the plaintiff referring to a statement made

by Judge Hawley in deciding this case for the Circuit Court of Appeals, has quoted in his brief, page 86, a paragraph to which he directs the attention of this court, which I will not reproduce, and says that the rule therein stated, correct enough in itself, is entirely misapplied to the case before the court, and proceeds, on page 87, to show in what the misapplication consists. The only answer that I think necessary to show counsel's misapplication of the rule, and his failure to apprehend its true character is, that he treats the matter of the defense set up by Hoffman as pertaining to himself personally, and the court recognizing it, does so with a view to aiding Hoffman. The universal rule laid down by all the courts and repeatedly stated in this brief, is that it is not for the sake of either of the parties to the transaction that the court allows this defense to be made, but for the sake of the law itself, and it is wholly immaterial whether the illegality of the contract sought to be enforced is presented by one party or the other. The question and only question before the court is, is the contract one which the court ought to recognize or aid in any manner, entirely irrespective of how the parties to it may be affected. Counsel has cited a considerable number of cases growing out of the Sunday laws in the New England states. This is evidence of counsel's industry, but it seems to me that it shows a plentiful lack of comprehension of the real question before the court.

As I read plaintiff's brief, and as I understand his argument made therein and the grounds he has taken all through this controversy, his chief reliance for reversing the judgment of the Circuit Court of Appeals are substantially these: Conceding the contract with the city to have been obtained by such means as that it would be void as against public policy, and conceding further that the agreement between Hoffman and McMullen to secure the contract from the city by the means finally adopted was also

void as against public policy, still, since Hoffman and McMullen, after the estimates were completed, the bids prepared and deposited and the contract awarded upon the bid of Hoffman & Bates, McMullen and Hoffman entered into a new agreement of partnership for constructing the work described in the contract with the city. That the money received by Hoffman was the result of the execution of the contract with the city, and that the contract signed by Hoffman and McMullen after the contract with the city had been awarded to Hoffman & Bates, was in no way concerned in, connected with, and did not grow out of the other unlawful contract, is free from all taint on account of them and must be enforced. Counsel rests this claim chiefly upon the authority of Brooks v. Martin, 2 Wall. 70. It is impossible for me to see how this case can be regarded as controlling the case at bar, or as authority in it, any further than it shows that an illegal contract cannot have the aid of the law to enforce it. The facts upon which the two cases rest are so absolutely unlike that it seems to me that it is scarcely possible to find a resemblance. In Brooks v. Martin a partnership was entered into between Brooks, Martin and Ford to engage in "the purchase and sale of bounty land warrants which may have been or may be issued under the laws of congress," etc. For the purpose of carrying out this agreement Brooks went to New Orleans, but, contrary to the terms of their partnership contract, bought soldiers' ***claims*** before any scrip or warrants had been issued upon them. Sales of these claims before warrants issued had been declared, by the act granting the lands to the soldiers, void. No title could pass to the purchaser as against the soldier. The act making the grant was limited in its effect exclusively to the soldiers; was for their protection and benefit and for no other purpose whatever. The public was concerned in the matter of these sales simply to the extent that to buy them was

to violate a law of the land. The contract of partnership between Brooks and Martin did not authorize the purchasing of these claims. They were purchased by Brooks not in pursuance of the partnership agreement, outside of it. While the law made sales of these claims void as against the soldiers from whom they were purchased, the title of the purchaser was valid against everybody else. Justice Miller says, in delivering the opinion: "Undoubtedly the main object of the ninth section of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. It was a wise and humane policy and no court could hesitate to enforce it, in a case which calls for its application." The business the partnership was formed to carry on was entirely legitimate and proper. The act of purchasing the claims, which was not within the purpose of the partnership as expressed in it, was unlawful. The proceeds of this unlawful transaction came into the hands of the partnership, and there the entire illegal transaction closed. From that time forward every step taken was illegal in itself, and was a part of the business which the partnership was organized to carry on. It concerned nobody to know how the partnership got these soldiers' claims if the soldiers themselves did not complain. Having acquired them, they proceeded to handle them as though legitimately acquired, and what should be the result could in no way be affected by the manner in which they were acquired. After the claims were secured it would seem that this partnership procured the scrip, then the warrants, then located the lands, then made sales of the lands, sometimes for cash and sometimes part for cash and the balance on time secured by mortgages; the money received from the sales of the lands was loaned upon notes and mortgages. Now, when Martin asked for a settlement of this partnership, and a division of the profits,

Brooks undertook to avoid a settlement and to avoid giving to Martin his share of the profits, by showing that a number of years prior to the time the suit was commenced he, perhaps with the consent of Martin, had, in violation of their partnership agreement, done an unlawful act in purchasing soldiers' claims, from which money had been received, and from the investment of which in pursuance of their partnership the profits sought to be divided by Martin had been derived. This court held that such a defense could not avail in such a case. It is perfectly apparent that in making the division claimed by Martin of the profits growing out of the transactions of the parties which were entirely legitimate, the aid of the illegal contract of purchasing the claims was in no way required. That transaction had been closed more than ten years before. In the division of the profits of the other transaction, even a reference to it was not necessary. It could affect the result in no possible way, and the court, it would seem to me, was bound to grant the relief prayed for. The case is not within the rule of any of the authorities where relief is denied. Between that case and the case at bar there is no common point. No great question of public policy was involved in the case of Brooks v. Martin. The only persons that could be affected were the few soldiers to whom congress had made the donations of land, and at the same time enacted a law for the protection of their interests. The public was concerned just to the extent that it could not look passively upon a violation of its laws, no matter how narrow they might be in their operation. To violate such a law was a defiance of public authority. To that extent the question of public policy was involved in Brooks v. Martin and no further.

In the case of McMullen v. Hoffman the question of public policy is involved in its broadest sense and its most extended and comprehensive application. It is so far-

reaching in its consequences that it includes almost every department of business, whether of the private individual or the sovereign. It has demanded and received the special attention and care of courts, and has been so jealously protected by them that the decisions concerning it constitute a class by themselves which furnish a guide to the court in administering the law where questions pertaining to the sale of property at public auction or contracts let upon sealed bids are involved. It applies to the peasant, who, desiring to change his place of abode, sells his little belongings at a public vendue, with equal force as to the great transactions of the government inviting bids for carrying its mails, constructing its forts, improving its rivers and harbors, building its battleships, and to all transactions in every department of society where goods are to be sold at public auction or contracts to be let to the lowest bidders. In this case the single city of Portland had occasion to expend nearly $2,000,000 for an important public purpose which must be supplied by some system of taxation of her citizens. It was important that the work should be done as cheaply as possible, and to that end bids were invited, competition among bidders was solicited, in order that the work might be done upon the most reasonable terms for the taxpayers. In this respect this case differs widely from Brooks v. Martin.

In the next place the illegal contract relied upon by Brooks had been long since completed in every possible sense; while in the case at bar the contracts, which, in order to make the case of Brooks v. Martin authority here for any purpose, must be admitted to be illegal, are made directly the foundation of the plaintiff's suit. The contract of Hoffman & Bates with the city is admitted to be void, but that very contract plaintiff is compelled to rely upon to make out his case. He could have no relief without its aid, and he has therefore presented it to the

court in his pleadings, and not only asks the court to decree to him the profits which he says have accrued to him from it, but he asks the court to take the contract itself into its own hands, and by its aid receive, and earn the profits which may result from its completion. He asks also that the alleged partnership agreement shall be executed by the court's order, and when all is completed he prays the court to divide the profits. What in Brooks v. Martin resembles this condition? In the next place the act of purchasing the soldiers' claims had no possible connection with, or relation to the transactions of the copartnership in their later dealings. In all these later dealings the contracts with the soldiers were matters of no possible interest. The later transactions were as absolutely separate and distinct from the matter of buying the claims, as two transactions could possibly be. In the case at bar the contract with the city and the partnership agreement were absolutely inseparable. The agreement of partnership depended for its very existence upon the contract with the city. Remove that and the partnership agreement ceased to exist. This contract with the city, which it is admitted was acquired through the unlawful acts of McMullen and Hoffman, is brought before this court by McMullen, and its aid is asked to enforce it, and at the same time he brings here what he calls a partnership agreement formed by the *particeps criminis* whose illegal acts procured the contract with the city, and asks the court to aid him in reaping the rewards of his own rascality. Is there anything in this that in the faintest manner resembles Brooks v. Martin, or which could make any rule of law which might control that case applicable to this? Certainly not. Add to these points of difference the other fact, which is so fully established, that the alleged partnership agreement which counsel contends was entered into after the contract with the city was awarded to Hoffman

& Bates, was, in fact, an agreement entered into long before that time, and was itself a part of the very unlawful combination by the aid of which the contract with the city was to be obtained, and the case of Brooks v. Martin is still less an authority in plaintiff's favor. The acts of the partnership between Brooks and Martin in dealing with the purchased claims carried them at every step away from the illegal contract of purchase. These acts were to secure *scrip* for the *claim;* to secure *warrants* for the *scrip;* to *enter lands* with the *warrants;* to sell the lands for money and mortgages; to loan money on mortgages. While from the beginning to end, in all the transactions between McMullen and Hoffman, the illegal contracts have been the center, the very life, the inspiring cause of every act, the thing and the only thing out of which they had any hope or expectation of reward for their misconduct, and McMullen now brings them with unclean hands into court and asks its aid.

No plainer, clearer or more correct statement of the distinction between this case and the case of Brooks v. Martin can be made than is made by Judge Hawley in the opinion rendered by him for the Circuit Court of Appeals. No better illustration can be brought forward than that presented in King v. Winants, 71 N. C. 469, of the distinction between the case of Brooks v. Martin and the case now at bar. The distinction is also made very plainly in the case of Morrison v. Bennett, 52 Pac. 533 (Mont. 1898), and a number of other cases cited in this brief. The illustration employed by the court in the case of King v. Winants is: "Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler the other rifles his pockets of a thousand dollars, and then refuses to divide; the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a court of justice hear them? No case can be found where a court

has allowed itself to be so abused. Now, if these robbers had taken the thousand dollars and invested it in some legitimate business as partners and had afterwards sought the aid of the court to settle up that legitimate business, the courts would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of Brooks v. Martin, supra, so much relied upon by the plaintiff."

Counsel for the plaintiff, referring to this illustration, for the purpose of distinguishing the case before that court from Brooks v. Martin, says, brief, pages 138-9: "If any parallel can be drawn between a case involving a flagrant breach of the peace and an infraction of a criminal statute, and a case in which a general offense against public policy is presented, we submit that this illustration makes for McMullen." Counsel then proceeeds with his argument upon the theory that the agreement between McMullen and Hoffman to complete the contract, which had been acquired by means which rendered it void, was as much a new and independent contract of partnership as was the agreement between the highwaymen to invest their money in a legitimate business after they had completed the robbery. That is the fault of the reasoning. In the case supposed, there is no suggestion that the parties had entered into an agreement of partnership to commit the robbery for the purpose of raising funds to carry on the business in which they afterwards invested it. The illustration assumes that the commission of the robbery was an entire independent act. Finding themselves in possesison of the money they then formed a partnership to invest it in a legitimate business. A division of the profits of that business would in no way require the aid of the transaction by which the money originally invested was acquired. In the case at bar all the testimony on the subject from every witness who has spoken shows that the agreement between

McMullen and Hoffman was not simply to secure a contract from the city, but to secure and execute such contract. The principal consideration was the execution, because out of that alone they were expecting to receive remuneration. When they seek, as they do here, for a division of the profits, it is not for the profits of an enterprise entered into as an independent transaction after the contract had been secured, but it is to divide the profits of an enterprise which they had jointly undertaken, a part of which was to secure the contract and another part to perform it, the two constituting one transaction, the aid of which being absolutely indispensable to enable the court to grant the relief prayed for.

Another error into which counsel has manifestly fallen is the assumption that the result would be the same, whether, in the case supposed, the highwaymen formed a partnership, the object of which was to commit the robbery for the purpose of raising funds to carry on a business in which they proposed to embark, and in which in pursuance of their partnership agreement they did in fact embark, and out of which profits were realized, that the rule in Brooks v. Martin would allow them to recover profits under such circumstances, the same as if the robbery were one thing and the partnership under which the funds obtained by the robbery was an entire different and independent thing. In the case first supposed, the partnership agreement to rob and to invest the money would constitute one agreement, and under all the authorities the illegal part of such a contract would render void the whole of it. In the latter the last contract would have no relation whatever to the act of procuring the money and might be legal.

If counsel for respondent should undertake to answer in detail the many suggestions presented in the brief of counsel for the plaintiff, this brief would be extended beyond all reasonable limits, and counsel will therefore rest the

case upon the affirmative arguments and the authorities cited, rather than in its denials and answers to what they regard as unsound and mistaken reasonings and arguments presented by counsel for the plaintiff, calling attention to only a few of the points made in plaintiff's argument.

All the leading cases cited in the plaintiff's brief were presented at the circuit at the time the exceptions to the answer were being considered, and were also presented in counsel's brief in the Circuit Court of Appeals. These authorities were considered and reviewed by both these courts, and this review and examination is set out in the record in the opinions delivered by them respectively. That of the circuit court, beginning on page 58 of the record, and that of the Circuit Court of Appeals on page 595, all these cases are fairly considered and the contention of counsel for plaintiff was more fully answered by them than counsel for respondent could expect to do, and will be content to refer the court to these opinions for answer to his contentions.

Counsel for plaintiff, in his brief, page 124, makes this statement: "If there was any turpitude in the action of Hoffman and McMullen in the submission of their bid, so far as Hoffman was concerned, this was beyond the reach of the court when this suit was brought, for the matters now assailed had been completed and Hoffman had placed beyond recall McMullen's interest in their joint venture. Counsel then proceeds to quote from the opinion of the learned judge of the Circuit Court of Appeals as follows, (Record, page 613): "The learned counsel for appellee, recognizing the force of the reasoning of the authorities, admits, for the purpose of his argument, that if, after award was made to Hoffman, he had refused to enter into the partnership arrangement, McMullen could not have compelled him to do so, nor collect any damages for his refusal, 'because the grounds then existing as the basis of appellee's claim would have been that he had rendered service in

securing the award, and, necessarily counting upon that service, he would have to bring it into court and its character would have been a subject for investigation. But when Hoffman entered into the partnership agreement all that matter, as between them, became a dead letter.' If this position could be maintained it would furnish a very convenient way for escaping the penalty which the law imposes upon all persons who have secured contracts in an illegal and unlawful manner. A contract secured by corrupt means—the bribing of public officers, buying off rival bidders, thus stifling all competition where contracts are to be let to the lowest bidder—could always be enforced by a simple agreement of partnership by parties guilty of the fraud. The fraud, under this rule, is a thing of the past—has become 'a dead letter' or is made honest by a single stroke of the pen, creating a new agreement to share and share alike in performing an illegal contract."

Counsel reasserts this proposition in his present brief and says that "when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead letter," and he says he will demonstrate it. This he undertakes to do by claiming that the agreement between McMullen and Hoffman of March 6th was a new agreement wholly independent of and disconnected with the fraudulent contract which he is himself seeking to enforce. And the way he says that that contract effects this result is that the execution of the contract by Hoffman operated as an assignment to McMullen of half interest in the profits that might be derived from the execution of an illegal contract, in the acquirement of which both Hoffman and McMullen were *particeps criminis*. A contract which, for the purposes of this case, he admits was procured from the city by means which rendered it illegal and void. As has been before stated in this brief, he bases his claim upon an agreement which the court could not, as he concedes, under the law, enforce, because it is void and illegal, and yet he claims that the same contract will be held to be

valid for the purpose of raising an implied promise on the part of Hoffman to pay McMullen his share of the profits claimed. It is an assertion by him of a doctrine which he cites no authority to support, but which is directly controverted by authorities cited in this brief, notably Gray v. Hook, 4 N. Y., 449. The authorities he does cite in support of his proposition simply declare what is the effect of a legal contract of partnership. Declares the obligation which exists between them and the interests which they have in the partnership effects. But the agreement upon which he relies is one which is void for many reasons. In the first place, the record shows that the pretended agreement of partnership bearing date of the 6th day of March, 1893, was not made at that time, that whatever rights McMullen had in the contract out of the execution of which the profits sought to be divided arose, was entered into long before the contract with the city was awarded, and that no new assignment was ever made, or attempted to be made, to McMullen of any interest that he had not acquired by his participation in the proceedings, which were themselves illegal, and by means of which the contract with the city was rendered unlawful and void.

In the next place, it cannot be possible that a rule of law exists which would prevent the courts from granting aid to enforce a contract because it is illegal, if such aid were asked by the individual whose conduct rendered it illegal, while, if the same parties formed themselves into a partnership, and in that capacity brought the same contract before the courts, its aid would not be denied.

No such case has ever been cited by counsel, and it would be surprising if any such should ever be found.

The reference to the transaction by the learned judge of the Court of Appeals as completely answers the contention, as ever so extended an argument could do. The

fact is, that the proposition is so unreasonable in its character, that it furnishes its own answer by its statement.

Counsel for plaintiff, at page 180 of his brief, makes this statement: "The action of McMullen in permitting a high bid for the work in suit had no rational tendency to deceive the water committee."

In support of this proposition counsel has cited a great number of authorities for the purpose of showing, as it seems, that the question of public policy is one which is resorted to only when all other defenses fail, and that, after all, it does not raise a question of any considerable importance. The great number of cases cited, which show with what jealous care the courts have undertaken to guard the people of this country against the frauds which might be practiced in cases where property is sold at public vendue, or contracts let to the lowest bidder, whether in the interest of private citizens, private corporations, public or quasi-public corporations, states or the nation, furnishes the most complete answer that I can make to the suggestion of counsel tending to bring this important element of our governmental policy into contempt, or at least to make it appear of small importance. And so far as the tendency of McMullen's conduct is concerned, a little reference to the testimony will show that the counsel for the plaintiff is altogether in error in his proposition. By this record it is shown that in 1887, when this work was offered by the water committee, Mr. McMullen, in the name of the San Francisco Bridge Company, was the lowest bidder, would have been entitled to the contract, but that the bonds were not issued out of which money was to be derived for paying for this work. This fact, presented McMullen before the committee as a careful bidder; one whose opinions of the value of the work would be entitled to consideration. His correspondence with Hoffman shows that he prided himself on what he termed being

a "hard bidder" and proposed to Hoffman that they make these people, who it was understood would be bidders at this letting, understand that they were going after the contract and were going to "bid hard" for it, and says in one of his letters, in substance, that if they find that we, the San Francisco Bridge Company, are going after this work on the same lines that we did before they will be afraid of us and will buy us off. In the next place, in the bid that was submitted by Mr. McMullen for the San Francisco Bridge Company in the present case, this same low bidder presented to the committee a bid in which he declared, in effect, that the work in question (manufacturing and laying the pipe) could not be profitably done for a sum less than $514,000. The bid of Hoffman & Bates, prepared and secretly agreed upon by McMullen & Hoffman, for the same work was $465,000, which is $49,000 less than the amount which Mr. McMullen said, by his bid for the San Francisco Bridge Company, the work could profitably be done for. Besides this, at the same bidding, Mr. McMullen, bidding for the San Francisco Bridge Company upon the submerged pipe, put in a lower bid than any other competitor, and would have been awarded the contract if the committee had chosen to let the work at that time. In the matter of the head works, the bridges and furnishing the plates, upon which Hoffman & Bates also bid, his was the lower bid. What other tendency, may I inquire, could these proceedings have had, than to lead the committee to believe that the bid of Hoffman & Bates must be an exceedingly favorable one to the city? What other "rational" tendency could this conduct of McMullen have than to deceive the water committee, to the manifest prejudice of the city. It does not seem that any further remarks are necessary on this feature of the plaintiff's case.

Another proposition presented by plaintiff's counsel and found on page 190 of brief is: "The water committee of the city of Portland was in no degree influenced by McMullen's bid, and did not take any different action in connection with it than it would have taken if it had never been submitted." This is answered by the single proposition that it is wholly immaterial whether the committee was or was not influenced by such action. A great number of cases have already been cited which state the doctrine too plainly to be successfully contradicted, that it is not the success of an unlawful scheme which renders the contract under such circumstances void. The rule is stated in Gibbs v. Smith, 115 Mass., 592, in these words by Devons, J.: "Nor is it any answer to show that no injury has been done to the party selling. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose which they must have contemplated when it was made; its validity is tested, not by its results, but by its objects, as shown by its terms." A score of cases might be cited repeating the principle here asserted, and so far as my reading and research have gone, not one case can be found to the contrary.

Under this head counsel in his brief, at page 201, refers to the circumstance disclosed by the testimony that, at the instance of McMullen, the bid which had been agreed upon between himself and Hoffman to be deposited in the name of Hoffman & Bates, of $479,000 in round numbers, was reduced at McMullen's instance $13,500, and that since the bid next below the bid of Hoffman & Bates so prepared was only $1,615 less than theirs, and assuming that but for this reduction this bid would have been accepted by the city, it is claimed that McMullen's act saved the city $11,885, for which counsel claims great consideration in favor of Mr. McMullen as a friend of the city.

In the light of the evidence this claim might, it seems to me, properly be regarded as ludicrous. The evidence,

it will be remembered, shows that the reason McMullen insisted that the bid should be reduced was that he had, to use a slang phrase, "got on" to Wakefield's bid, and if he did not get below that he would lose the contract. So he deliberately flung away $13,500 which he was trying to get and was only prevented from getting, because he was afraid that somebody would underbid him. The fact that he flung it away for such a reason effectually impeaches the integrity of his bid, and shows that he was willing to get from the city, not compensation for what the work he was proposing to do was reasonably worth, with a fair profit, but all that he could possibly compel the city to pay. A claim like this from McMullen stands upon the same footing as would be a claim by a highwayman for credit because in committing his robbery he overlooked a secret pocket which contained a sum of money, and so left it unstolen. McMullen is no more entitled to credit for having caused a reduction of the proposed bid than the highwayman would have been because he overlooked the money of his victim.

All further discussion of this point in plaintiff's argument will be dismissed with the declaration that it was wholly immaterial whether the city actually suffered or not, if the course pursued by Hoffman and McMullen in procuring the contract with the city naturally tended to that end.

It is not, however, by any means conceded that in point of fact no injury resulted to the city from the secret combination of McMullen and Hoffman, but on the contrary it is strenuously insisted that the record shows that, but for this secret combination, unknown to the committee and directly intended to prevent competition between them, did result in the city's accepting the bid of Hoffman & Bates of $465,000 for manufacturing and laying the pipe, whereas, but for that combination, McMullen,

for the San Francisco Bridge Company, would have taken the contract, based upon the estimates which he and his engineers had prepared, and which he repeatedly declared would have been a safe bid, for a sum not to exceed $420,000. The city is, therefore, actual loser as a result of this secret combination not less than $45,000.

Another point stated in plaintiff's brief on page 201 is: "The partnership business of Hoffman and McMullen embraced work outside of the contract of the city of Portland with Hoffman, and also numerous transactions wholly independent of that contract, the profits of which were included in the decree of the Circuit Court in the case at bar."

The answer to this claim is apparent at a glance at the record and the circumstances disclosed by it. A contract had been entered into between Hoffman & Bates and the city to perform certain work for the city. In the course of its performance in some matters of detail, work was required not strictly within the terms of the contract with the city; that is to say, not specifically mentioned in the specifications, but which were in fact included within the power of the city under the contract, to require the same to be done, paying therefor what it should be reasonably worth. The work performed and included in the decree of the Circuit Court was directly connected with and constituted a part of the work necessary to be done to the proper completion of the contract, although not expressed in it, and this the city had the right to require. The only difference being that the work so required of the contractor, and not enumerated in the specifications, entitled the contractor to extra compensation.

It is not probable that contracts of this magnitude are ever executed without more or less "extra work" being done, for which extra compensation is made, and although not technically within the written specifications, is always regarded as a part of the contract essential to the proper

completion of the work. Besides, under the circumstances of the case, the work here done for which compensation was made by the city, was done in pursuance of an illegal contract entered into by these parties long before the contract was awarded by the city to Hoffman & Bates, the claim of McMullen to the contrary notwithstanding, and this work is so directly connected with, and growing out of, and belonging to the unlawful transaction that it cannot be segregated from it.

It should be said in this connection that the quotation contained in the brief of counsel for the plaintiff, on page 201, purporting to be from the writing signed by McMullen and Hoffman, is not correctly made, undoubtedly the result of inadvertence. The quotation is: "It is further hereby agreed that if either of the parties hereto shall get a contract for doing, *or do* any other work let or to be let by said committee, for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be equally shared and borne by said parties." The contract itself is as follows: "And it is further hereby agreed that if either of the parties shall get a contract for doing, *or to do*, any other part of the work," etc.

It will be noticed that the language as quoted by counsel that "if either of the parties hereto shall get a contract for doing *or do* any other work let," etc. The distinction between the two expressions is very material and very important so far as the claim now made by counsel for the plaintiff is concerned. His statement is that if the parties shall get a contract for doing *or do* any other work. That means if they shall get a contract to do any other work they shall divide the profits, or if they shall *do* any other work *without* a contract they shall divide the profits. Now the contract does not so provide. The contract provides that if they shall get a ***contract for doing*** or shall get a ***contract to do*** any other work they shall divide the profits. There is no stipulation in their partner-

ship agreement to the effect that any work shall be done except such as shall be done upon contract, and no profits divided, except such as shall result from the execution of such contract. Therefore, counsel's argument shows for itself that McMullen, under the terms of his agreement with Hoffman, would be without a claim to any profits for work done, except in pursuance of contracts duly entered into. He is not, therefore, in any view of the case, basing his right upon his agreement with Hoffman, entitled to any share of the profits of work done by Hoffman in the construction of the water works, which was not included in the specifications attached to the contract with the city, because there is no allegation or proof that the extra work was done in pursuance of any contract.

Two other items are referred to which need no more than a passing notice. One is that Mr. Hoffman established and carried on along with the work as it progressed a boarding-house, at which the employes upon the work were boarded and a profit realized. That he also established and maintained along the same line a store from which supplies could be furnished to the employes, and from this store profits were also realized. The claim that these matters constitute a separate business, a distinct enterprise carried on by the parties engaged in constructing the water works, is so manifestly unsound that it scarcely seems necessary to answer it. This store and eating-house were as much a part of the system of constructing the work, of completing the contract, as was the hiring of men. The object of locating an eating-house in the neighborhood of the work was to facilitate the work. Men could not labor without food, and it was absolutely as necessary that means should be taken to provide them with food as to furnish them with tools, and this was done, not as an independent enterprise, but as one of the agencies employed for the purpose of speedily bringing the

work to a conclusion. The fact that Mr. Hoffman showed himself to be so skillful a manager of the business as to turn this necessity into a source of profit, only shows how skillfully he managed the business, and how he reduced the expenses of his contract to the minimum. What is said in regard to the eating-house applies equally to the store. Laborers had to be clothed. If they were compelled to quit their employment to make journeys to the city whenever they were in need of shoes or of clothing or of tobacco, the contractors would not only have been deprived of their labor during their absence, but they would have taken the greater risk of their employes failing to return. For the purpose of avoiding these contingencies, the store was established, the laborers provided on the spot with what they needed, and again through Mr. Hoffman's skillful management this necessity was changed from a source of probable loss, and not only facilitated the prosecution of the work, but made it a source of profit. All these things were directly connected with, and a part of, the execution of the contract with the city. If my memory is not at fault, this feature of the case was first presented in counsel's application for a rehearing at the Court of Appeals, and was not suggested at the trial, either at the Circuit or in the Court of Appeals. If I correctly understand counsel's position here, it is that if this court should find that the Circuit Court of Appeals committed no error in any other regard, it did commit an error in not finding that this extra work done by Hoffman in constructing the water works and in keeping the boarding-house and the store, were entirely unaffected by the illegality which rendered void the contract in other respects, and that a decree must be entered here requiring the respondent to pay over to the plaintiff the profits arising from these three sources. It is impossible for me to suppose that this court can reach any such conclusion. If there were no other reason, the

fact that the record discloses that these transactions are directly connected with, immediately grow out of, and are dependent upon the illegal contract which plaintiff is here now to enforce, would make it impossible for the court to grant such relief.

Out of all that has been said by the plaintiff or submitted in this very much too extended brief, this case comes to a single point, and that is, that the contracts upon which the plaintiff's cause rests are shown by the record and by the law applicable to such cases to be void as against public policy, and cannot therefore have the aid of the court to enforce them. That the plaintiff comes into court basing his right to recover upon contracts which are tainted with iniquity, are foul with fraud, were procured by the aid of acts of deceit and wickedness, and that the court cannot lend its aid to or assist those who have thus willfully trampled the law under foot. That no fact has been presented in this case as the basis of a legal principle, which takes the case out of the operation of the rule that denies to persons who are *particeps criminis* in the law's violation the aid of the court to assist them in the division of the plunder which they have acquired by their unlawful conduct. This was the conclusion reached by the Circuit Court of Appeals. That conclusion has been most ably, forcibly and directly stated in the opinion of that court. I am unable to find a single proposition in that opinion which is not supported by an overwhelming array of authorities, almost all of which have never been controverted in any court. I am unable to discover where any error was committed, either in the findings of fact or in the application of the law to them, and while it is true that as the result of a casual examination, as I take it it necessarily was, made upon the application of plaintiff for the writ of certiorari, this court determined to issue its writ, I cannot avoid the conclusion that upon a careful, painstak-

ing, thorough examination of the facts and the law this court will reach the conclusion that the Circuit Court of Appeals was correct, and their decree will be affirmed.

If such is the conclusion reached it is, of course, an end of the case, but if not it will then become necessary to consider the respondent's second defense. This defense is that on account of the failure of McMullen to perform his part of the partnership agreement, Lee Hoffman, on the 16th of September, 1893, dissolved that partnership, and thereafter McMullen had no part whatever in its execution and no interest in its result; was entitled to no profits which might thereafter have been earned, and was liable for no losses.

The partnership agreement, whether it be regarded as the agreement entered into between Hoffman and Catt, the manager of the San Francisco Bridge Company in 1891, or the writing which was signed by the parties on the 6th day of March, 1893, specifically provided that each of the parties should furnish one-half of the money necessary to carry on the enterprise and that they should share equally the profits or pay the losses which might result from the venture. The complainant's bill does not allege that he performed his part of the agreement by paying his proportion of the money, or that he ever paid any money into a fund for the purpose of carrying on the work, but he does allege that the San Francisco Bridge Company furnished a plant for such work and purchased certain utensils required in laying the pipe, the total amount of which, as the record shows, was found by the Circuit Court, on the final hearing, to be something over $2,300. (R., p. 96.) Mr. Hoffman took active control of the work, managed it and was compelled to, and did, furnish the funds necessary to carry it on. For this purpose he paid into a fund something over $10,000 in money and provided a plant which made the amount advanced by

him something over $15,000. The contract with the city provided that monthly estimates should be made of the work done, and that on the 20th day of the following month the money earned in the preceding month should be paid to the contractor, less 10 per cent. retained for the protection of the city. The testimony shows that active work of laying the pipe commenced about the first of June, 1893. Mr. Hoffman made his contracts, as it would seem, for his labor and supplies, by which he bound himself to make payments on the 20th of each month succeeding the month on which the labor was performed or the supplies furnished. In making these contracts he relied upon the engagement of McMullen to furnish his share of the money required above the amount received from the city. It may be presumed that he did this for the reason that payments promptly made would enable him to purchase supplies greatly to the advantage of the contractor, and the same is true of the labor employed. He was conscious that the amount of the estimates would be small in the early part of the work, and that funds would then be necessary, if ever. The correspondence between himself and McMullen shows that in Hoffman's opinion $20,000 would be necessary to properly carry on the work. Of this sum, as before stated, Hoffman paid $10,000 into the treasury, and called upon McMullen to pay in a like sum. McMullen, in reply to Hoffman's appeal, responded by admitting his liability, insisting upon his inability to pay or to comply with his acknowledged obligation, and never did, in fact, pay any sum whatever to be applied in the prosecution of the work.

In the early part of September, 1893, Hoffman was called before the water committee and notified by them that they had been unable to sell bonds, had no means of knowing when sales would be effected and that they were without sufficient funds to pay bills which would fall due

on the 20th. Hoffman was without sufficient funds to meet the obligations which would fall due on the 20th. He wrote to McMullen informing him that unless he should pay into the business $10,000 by the 20th of September he should be compelled to refuse longer to recognize him as a partner in the work, and must look about and find, if he could, some one who would furnish the necessary funds. McMullen replied on the 14th of September that he could not raise the money, entered into a long criticism of Hoffman's management of the business, repeated what he had said on several occasions before that Hoffman was not properly managing the business, for the reason that he arranged to pay bills as they fell due, without regard to the amounts received upon estimates, insisted that instead of making his contracts good he ought to ***stand his creditors off,*** make them go without their pay indefinitely, or until the money could be received from the city, although he knew that the lines upon which Hoffman had conducted the business were to have no overdue debts, but to pay as he had contracted to do. On receipt of this letter, and on the 16th day of September, Hoffman again wrote McMullen notifying him that unless the money, $10,000, which was needed for the purpose of meeting bills due on the 20th, and which was due from McMullen as his share, though much less than Hoffman had put into the enterprise, was paid by the 20th, he would understand that after that date Mr. McMullen would not be recognized as a partner in the work. Mr. McMullen responded to this letter on the 18th, denying Hoffman's right to dissolve the partnership, again entering into an extensive criticism upon the manner in which Hoffman had conducted the work. The correspondence will show that McMullen repeatedly acknowledged his obligation, and it will also show that instead of paying the money as he agreed to do, he harassed Hoffman by long lectures in

the way of advice, much of which contemplated Hoffman's acting with total disregard to his contracts, and urged that he supply the place of money by *standing his creditors off.* It ought to be said in this connection, in justice to Mr. Hoffman, that the time this work was being carried on, in the summer of 1893, was one of the most critical times ever known in the history of the Pacific coast. The business of the whole country was prostrated, which brought, by a financial panic, almost every industry to a standstill. Manufacturing establishments ceased operations and the laboring classes were unable to procure employment; the streets were full of idle men clamoring, not so much for bread as an opportunity to earn it. Under such circumstances for an employer of men to have given the least opportunity for the belief that they would not receive their pay at the end of the month or week would have been a serious menace to his personal safety. A failure to pay these men who had seized upon this only opportunity to procure bread for their families would have placed the very life of the employer in extreme hazard. Besides this, as stated, Hoffman already had $15,000 of his own money invested. He was bound in a bond to the city for $140,000 more, if he failed to perform his agreement. This last he would not be required to pay, of course, if his failure to perform resulted from the city's default. But to lose what he had already put in, and to hazard what might come as a result of a failure from his obligations to subcontractors was a source of such trouble to Hoffman as nobody could describe but himself. Unfortunately for him, and the real truth of this case, an accident snatched his life away and changed him in an instant from an active, vigorous, healthy, intelligent man to a corpse. The fact of his death has left the way to Mr. McMullen free and unobstructed to put such construction upon the relation of the parties which were known only to themselves, as Mr. McMullen sees fit.

It is within the observation of all men, particularly those who are engaged in the practice of the law, that the interested survivor generally has a convenient faculty for remembering with great precision what is to his own interest and with equal facility forgetting what happens to be against him. There are circumstances in this case which plainly show that Mr. McMullen is no exception to this class of survivors.

The attention of the court is respectfully called in this connection to the correspondence between McMullen and Hoffman, quoting only such portions of the correspondence as refers directly to the matters of money, but respectfully suggesting that a reading of the entire correspondence will be very instructive for the purpose of showing the actual conduct of these parties and the motive which finally actuated Mr. Hoffman to make the defense which this record presents.

Under date of June 6, 1893, McMullen writes Hoffman (Record, page 548): "With regard to money matters, Lee, I expect it will take a little money to run the job the first few months, until we begin to get decent estimates, but I do not think it ought to take a great deal if we keep old man Smith's estimates up full and prompt." The letter further proposes that Hoffman join with McMullen in a note for the purpose of raising money to carry on the job. On the 9th of June, 1893 (R. 575), Hoffman writes McMullen thus: "About money matters: I do not care to borrow any money, as I have my money all provided for; anyway, I doubt very much if we could raise money on notes until the scare blows over a little. I think it will require about $20,000 to carry this work along." On June 15, 1893, McMullen writes Hoffman (R. 549): "I did not think it would take so much money to carry that job as the amount you mention. I do not think so now. I do not understand that you proposed to pay everything each month until you get your estimates for the preceding month; then, as you get 90 per cent. of what you do, it seems to me that we ought to run the job after we get it

started and the plant and camp on the ground. Later on I shall not be so hard up, but for the next two or three months I shall not have a dollar to put into anything." Replying to this letter under date of June 20, Hoffman writes (R. 576): "About money matters: You don't seem to think it will take $20,000 to carry this work; I do, as we have to pay for our rivets, gates, valves, etc., as they arrive and get payment as they are put in place; of course, I am not going to pay out any more money than I can help. It is out of the question to raise any money up here from the banks at present. However, I am in hopes the scare will soon let up and the banks will let out money again."

On the 6th of July, McMullen writes Hoffman (R. 551): "I hope you are in position there to handle that business for the first three or four months; after that time I think we will be in shape to stand in and pay our part of what may be needed. I am willing to pay any interest that you think reasonable, and am also willing to put up my individual or the bridge company's note to guarantee the payment with any bank there, if you so desire. Of course, I know that you are running the job with just as little cash as possible. I thought, however, that Smith would allow us estimates on the rivets and fittings on their delivery in Portland. I need not tell you what you already know; that is, there is a great deal in keeping your estimates up full, and getting in everything. Neither do I wish to interfere with your method of doing business, as everybody has their own way, but if I were running it I would not pay anything on account of it except my contracts and labor till I was in easy circumstances; in other words, I would make the people carry me with whom I did business. That is what we do. . . . Now, Lee, I do not want you to think that I want to fall down or go back on you. I believe that you know that *we did our part in getting the job*, and before we get through I am satisfied that you will concede we have done our part *towards executing it*."

Replying to McMullen's letter of July 6 (R. 577), Hoffman writes: "Now, Mac, I have put in this work just $10,000 outside of my tools and outfit, and by the first of the month we will have to pay our payroll, rivet and other

bills, all told amounting to at least $4,000 or $5,000. We have now on the way trestles and valves, iron for bands, etc., which will all have to be paid before we get another estimate. We have got an estimate of $5,000 all told, for pipe laid and trenching, of this amount $1,900 for trenching. By the time we pay W. & Z. and the hauling we will only have $3,500 to pay bills with. Now, Mac, I don't feel like carrying this work alone, and as for borrowing money on my note, I don't think it could be done; in fact, you cannot borrow money here at all. I am in the same boat you are in. I have got money coming to me, but cannot get it. *I am not finding any fault with your part of the work of getting the contract, but you must understand that we did some work and have been working ever since, and am willing to do my part, but I cannot afford to do it all;* therefore, I must ask you to put in your half of what it takes to run this work. I have started a separate bank account, Hoffman & Bates, and I put in $10,000, and I have not changed my mind as to the amount it will take to carry this work ($20,000) on in good shape, and I still think we are going to make good money out of the contract, but it requires a great deal of watching."

Replying to the letter of July 14, McMullen says, under date of July 22 (R. 553): "Now, Lee, with regard to money: *I recognize that it is incumbent upon me to put up half the money to run that job with*, and I stand ready to do anything that it is possible for me to do, but for the last 60 days I have had all I could do to get along, and it does not look a bit better for the next 60 days to come: after that time we will begin to get in some money." Mr. McMullen follows this by a proposition to borrow money in Portland by Hoffman joining him and he using the credit of the San Francisco Bridge Company.

Under date of September 11, Hoffman writes McMullen as follows: "J. McMullen, Esq., San Francisco, Dear Sir: The water works contract is very much mixed up. Last Thursday the committee held a meeting and called me in and there told me they had no money to pay me on the 20th of this month, and told me they did not know if they could sell the bonds or not and I could keep on or stop as

I chose to do. I insisted that it was for them to say if I should go ahead or not, as they had a right to stop the contract, but I did not, as it would involve me with my subcontractors, but they would not tell me to stop, so I had to keep on. Our estimate is $66,000, and they have $40,000 that they are going to divide equally among all the contractors, so we will get about $20,000, and after paying Wolff & Zwicker and Cook & Kiernan their pro ratio we will have about $9,000 left to pay about $22,500 payroll, station men included, besides iron gates and supplies besides, this month. Now, Mac, I am compelled to insist that you raise your proportion of this money, as I will absolutely not carry this work any longer this way. You will either have to put up your share of the money or let go of the contract, as you agreed to do. I have held off as long as I could with the hope that I could swing it alone, but I cannot do it any longer. I don't want you to think that I am taking advantage of the hard luck you are in, but you can see the necessity of having money. If you will furnish $10,000 by the 20th I will carry on the contract the same way I did before, but this amount I must insist on your furnishing, or you must let go, and I will get some one in that will furnish part of the money. I still think we will make some money. We are not going to make very much, but we will make some if we don't have too many leaks after we get the water turned on Now, Mac, I don't want you to think that I want to take advantage of you, because I don't, and if it was you that was doing this work and I could not do my share I would not ask you to do for me. If I could do this alone I would, but I absolutely can't do it. Please let me hear from you at once, as I must do something with this work before pay day. Yours truly, Lee Hoffman."

A letter written by Hoffman to McMullen on the 31st of July, 1893 (R. 209), was not inserted in its place in this correspondence, and I will insert it here. "Now, Mac, I want to tell you once more about the money matters up here. I have now put into this thing $15,100 in cash, and tomorrow there will not be a dollar left to pay our bills as we always have done heretofore. Now, there is no use of your repeating the proposition to borrow money up here,

as your bridge stock and all the collateral I have got with your notes attached would not borrow $20,000, nor would I undertake to raise $5,000 here now, nor could we have done so within the last forty days. *It is a good deal for you to ask of me to take this work and run it and furnish all the money, and not do anything else.* You are taking work all over the country, putting your money into other work, and I cannot do anything but set here and manage this job. The water committee have not yet sold their bonds, and if they should fail to sell them I would have less than $20,000 to pay for work performed this month. Now, Mac, I am willing and ready to live up to my agreement in this contract, and you must do the same. I don't feel as if I was treated right in the matter; we went into this thing together; you agreed to put up your part of the money, and I agreed to put up my portion and arranged for it. If you will put up *$8,000* cash, in addition to the plant furnished, I will try and carry the work along, but this amount I must have not later than the 5th, as I must use part of my money in other places by that time. Please let me hear from you on receipt of this."

Replying to the letter of July 31st, McMullen, on the 3d of August, writes (R. 555): "It is not possible for me to make the remittance you demand. Were it, you would not have to demand it. It is possible that I may be able to send you $5,000 next week; this, however, will depend on whether we succeed in making a certain collection. I can only tell you that I will do my utmost to furnish some funds to help handle that job, and for what money and time you put into the job more than I do, I trust I shall be able to make you a satisfactory compensation. *I think you are too sensitive about paying everything when it is due;* no one here does that these times. I will tell you what I do in my business: When I have money I pay, and when I do not have money, I tell the people so and let them wait, and people with ten times the money and resources that I have treat me in the same way. Our labor is the only thing that we strain a point to meet promptly. Had I been running that job, everything I bought for it I should have agreed to have paid when I received my estimates on it—when it went into the work. A firm with

your credit could readily have done this. This is what we do invariably. *If, as you intimate, the city should not pay it seems to me that would be sufficient reason for you not paying, and you ought not to be worried on that score. It is hardly fair for you to intimate that I asked or expected you to furnish all the money and do nothing but run that job,* after I had explained to you that I was utterly unable to send you any money at this time. . . . *I realize it is not the explanation that you want; that it is money,* and I will try and see what I can do. Meantime, stand them off."

McMullen also writes to Hoffman on the date of August 4, 1893 (R. 558), and says: "About money, Lee, I feel just as bad and just as much annoyed at being unable to do my part as you do. I have been rustling today to see if I could not raise a loan, but thus far I am unable to do so. I have some hopes of getting $5,000 next week. . . . If I get this money I will send it to you, although I am awfully hard pressed on every side here. *I think you are very foolish to try to meet every payment promptly there.* I would stand them off for everything, or pay them 50 per cent., or whatever I could out of my estimates, and such things as supplies for camps *I would not pay for six months if I did not feel like it.* Now, do not construe anything I have said as wanting to run the job, *but I think you are too thin-skinned and too sensitive about this paying.*"

McMullen, under date of 14th of September (R. 558), in replying to Hoffman's letter of the 11th, in which Hoffman notifies him that he must put up $10,000 by the 20th or go out of the contract, starts out with giving to Mr. Hoffman his idea of the proper solution of the financial difficulties in the matter of the pipe line contract, and on page 559 he uses this language: "If you have freight bills or contract obligations to meet which could not be stood off, would advise taking further bonds and hypothecating them as above suggested and meet such obligations. . . . . My own finances are in such a condition that it is absolutely impossible for me to comply with your request to furnish you $10,000 before the 20th of this

month. Neither can I accede to your proposition that I should withdraw from and surrender my interest in the contract. Neither have I ever intimated that I would do so, as you imply in your letter, except in my letter to you of March 14, 1893; to the proposition contained in this letter I am still open; or if you desire to make me an offer for my interest in this contract, I am open to the proposition."

Under date of the 16th of September, and replying to McMullen's letter of the 14th (R. 580), Hoffman writes McMullen as follows: "J. McMullen, Esq., San Francisco. Dear Sir—Yours of the 14th at hand and contents noted. Now, Mac, there is no use for you to tell me how to do business. I have done business here for a number of years to suit me, and shall keep on, if possible. It is all very well to tell me what to do if you are in San Francisco, but I am here and know just what is wanted. Now, I want to tell you once for all that unless you put up your share of the money, namely, $10,000, by the 20th of this month, I shall not recognize you in this contract after that date, and shall make such arrangements as I see fit. If the San Francisco Bridge Company has got the credit you claim it has, and I have no doubt but what it has got just what you say it has. San Francisco is the place for them to raise money to carry on their portion of this work. You seem to raise money enough to carry on the Spokane and Yakima work, but you can do nothing for this. Now, there is no use of talking this matter over any further. I have told you what I want you to do. If you want to take this work and run it, you can do so. I will put up my portion of the money. But I draw the line on that. Hoping to get your share of the money by the time specified, I am yours, very truly. Lee Hoffman."

To this letter McMullen replied, under date of the 18th of September (R. 560), in which he continues his lecture to Hoffman upon the manner in which the work has been conducted, criticising his course of action and finally notifying Mr. Hoffman that he will not consent to withdraw from the contract.

No further correspondence took place between McMullen and Hoffman. McMullen simply denied Hoffman's right to dissolve the partnership or force him out of the contract. McMullen swears, but not with great confidence, that he was out upon the work after his letter of the 18th of September; that he was there with Hoffman, a proposition which is probably untrue, and one of the things which McMullen might safely assert, being conscious that Hoffman was dead and could not contradict it. That he may have been on the work after that date is not improbable. Hoffman had no control over his actions; but that he was there with Hoffman or taking any part in the business is entirely improbable.

The correspondence just quoted shows how persistent Mr. Hoffman had been in his appeals to McMullen to perform his part of the agreement, and to pay in the money necessary to carry on the work. Hoffman explained the necessity for the money and literally begged McMullen to furnish it. He assured him that there was likely to be profit if the contract was executed, but he assured him at the same time that in order to carry it on money was required. This McMullen admitted. He knew also that Hoffman had paid in his proportion of the money required to carry on the work, and that it was being carried on with that money and could not have proceeded without it. All that McMullen did in the way of furnishing money in response to Hoffman's appeal for it, was to admit his liability, offer his own note and that of the San Francisco Bridge Company as security for loans, in which he required the aid of Hoffman's name, and upon which he was unable to borrow a dollar, and so far as the San Francisco Bridge Company was concerned, was, as shown by McMullen's own testimony, in the hands of a receiver at a period not long after this offer was made. Hoffman had already furnished in cash the money he was required to put in, and

now McMullen demanded the aid of his name for the purpose of securing McMullen's proportion and upon security which McMullen himself could not procure a dollar. When the crisis finally came and Hoffman found himself confronted with demands which must be met on the 20th of September, and when notified by the committee that bonds could not be sold and not sufficient money was in hand to pay estimates which would fall due on that day, Hoffman was driven to the necessity of attempting to make provision elsewhere. He did what any reasonable business man would have done. He notified McMullen that if he, McMullen, was unfortunate in not being able to raise his proportion of the funds necessary to carry on the work, that should not result to the injury of Hoffman, nor should it be an excuse why Hoffman should take the great responsibility that rested upon him to carry on that work and divide the profits equally with McMullen. He gave McMullen full notice of the situation. He begged him to respond and to make good his promise, and finally adopted the only course open to him, and that was to dissolve their partnership. The actual condition of affairs between the 1st and 20th days of September is fully described in the testimony of Mr. F. T. Dodge, beginning on page 404 of the record, and of Mr. Henry Failing, page 414. It was while the condition of things there described prevailed that Mr. Hoffman was in the greatest distress, and during all the time he had not the faintest grounds to hope or reason to believe that the city would come to his relief, and it was while that condition prevailed that he put an end to the partnership between himself and McMullen. McMullen's conduct in the premises indicated his acquiescence in Hoffman's action, although in his letter of the 18th of September he denied Hoffman's right to in any way affect his claim to, or interest in, the contract. It is true that after this proceeding had taken place, and, unexpectedly to all

parties, a sale was effected of the city's bonds and money was provided to meet the estimates for the 20th of September, and it is also true that thereafter no difficulty was experienced by the city in the sale of the bonds, and money sufficient to carry on the work provided by the city. But after the dissolution of the contract McMullen made no application to Hoffman to be reinstated, in fact, said nothing, did nothing, concerned himself with nothing whatever but his own business for a period of more than sixteen months, during which time Hoffman, by the closest attention, carried the work to such a point of completion that the pipe line was turned over to the city for the six months' test provided for by the contract of construction. At this point, Mr. McMullen comes upon the scene, marches into the office of Hoffman and apparently with the authority of a feudal lord, demanded of Mr. Hoffman that the books relating to this contract be turned over to him for inspection, demanded an accounting and insisted that he was entitled to one-half of the profits which had resulted from the venture in which, according to his own showing, he had not then a dollar at stake, the money for the plant he had furnished and the tools he had purchased having been tendered to the San Francisco Bridge Company by Hoffman before this demand was made, but which Mr. McMullen said had not been accepted for the reason that the parties were at that time in the hands of a receiver. ***The chief service rendered by Mr. McMullen as the basis for his claim was*** that which he had ***rendered in procuring the contract***, and this the record shows consisted in the skill with which he had conceived schemes and the energy with which he executed them, which resulted in securing a contract with the city in the name of Hoffman & Bates, which contract, because of these same schemes and this same energy, was illegal and void.

When Hoffman refused this demand and proposed to

make some arrangement with Mr. McMullen for compensating him liberally for what he had done in the premises, McMullen indignantly rejected the proposition unless the books were submitted for his examination, and brought this suit. Hoffman was compelled to defend it. In doing so he necessarily laid his whole case before counsel and asked their opinion as to his legal right. Counsel were bound to state what, in their judgment, was the rule of law applicable to such a case. One of the conclusions reached was that this contract of partnership, being unlimited in its duration, might be dissolved by either party at any time, being liable for damages resulting from the dissolution, if wrongful. They were further of the opinion that if, for any cause, the court should find that the contract of partnership was limited in time, either party might still dissolve it, being liable, however, if the dissolution was wrongful, for the damages caused thereby. A recital of the facts of the case fully and completely, as they were afterwards stated in the respondent's answer, forced counsel to the conclusion that all the contracts or pretended contracts that had resulted from the combination between these two men were against public policy and absolutely void, and that the plaintiff could not recover, even if the partnership had never been dissolved. It is under circumstances like these that Mr. Hoffman is placed before the court in the position of one in whose mouth one of the defenses here made always sounds ill. It is no part of the purpose of counsel for defendant to excuse or justify the acts of Hoffman in forming the illegal combination into which he entered for the purpose of despoiling the city. But the statement is made, and the defense urged by counsel, for the reason that it is a correct representation of the facts in the case, and, ill as the defense may sound, an inquiry into the facts shows it was not interposed to deprive McMullen of a dollar justly due him, but to secure to Hoffman what he

had earned by his own energy and with his own capital.

In support of the proposition that a partnership between two or more persons which is not limited as to its duration may be dissolved by either of them at any time the following cases are cited:

Skinner v. Tinker, 34 Barb. 333.
McEvery v. Lewis, 76 N. Y. 373.
Fletcher v. Reed, 131 Mass. 312.
Blake v. Sweeting, 12 N. E. 67 (Ills.).
Walker v. Whipple, 58 Mich. 476.
Solomon v. Kirkwood, 55 Mich. 256.
3 Kent's Com., 53.
Jacob C. Slemmer's Appeal, 58 Pa. St. 168.
Carlton v. Cummings, 51 Ind. 478.
Lawrence v. Robinson, 4 Col. 567.
Pine v. Ormsby, 2 Abb. Pr. 375.
Berry v. Folkes, 60 Miss. 576.
Whiting v. Leakin, 66 Md. 255.
Blaker v. Sands, 29 Kan. 551.
Mason v. Connell, 1 Whart. 381.
Skinner v. Dayton, 19 Johns. 531.

In Solomon v. Kirkwood, 55 Mich. 256, the Supreme Court of Michigan said: "The right of a partner to dissolve, it is said, is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the contract as to all future contracts, . . . the only consequence being that he thereby subjects himself to claim for damages for a breach of his covenant."

The partnership agreement disclosed by the record in this case, whether it be regarded as having been entered into in 1891, or in 1893, is not limited in its duration. The agreement between Hoffman and Catt in 1891 embraced any and all work which might be let by contract for bringing Bull Run water to Portland. It was not limited as to

its duration. It was impossible to tell how much of the work would be secured or how long a time would be required to perform it, if secured. The writing signed by the parties in March, 1893, referred especially to the contract which had been awarded to the parties in the name of Hoffman & Bates, and then in term provided for what was included in the original contract of 1891 by saying that they would share in the profits of any contract which they might get for doing any other work for bringing Bull Run water to Portland. McMullen's own evidence shows that Hoffman and McMullen made very strenuous efforts to secure the contract for the submerged pipe, going so far as to undertake to buy off all opposition or *to take them in* so as to get the largest sum possible out of the city. At the time the writing of March 6 was signed the San Francisco Bridge Company stood upon the records of the water committee as the lowest bidder for the submerged pipe, and there was a great desire on the part of McMullen to secure the contract on that bid. McMullen says that there are $20,000 or $25,000 profit in it if they can only secure it upon the bid already presented. Therefore, it seems plain that the partnership agreement was one which Hoffman had a right at any time to dissolve, and that he did in fact dissolve it. The rule laid down in the case of Slemmer's Appeal, 58 Pa. St. 168, is that: "It is in the power of one partner to withdraw at any time and thus cause a technical dissolution of the firm subject to liability to his co-partners if the act was wrongful." This language is not confined to cases where the partnership is not limited in its duration, but to all partnerships. The remaining partners may have their remedy in such case if the dissolution was wrongful. That remedy McMullen might have had here if the dissolution was wrongful and if he had been able to come into court with a contract not void because illegal.

Hoffman having dissolved the partnership, whatever was earned from it after the dissolution McMullen had no

claim upon. Whatever interest he might have had in it, or whatever claim he might have had upon any profits which may have accrued prior to the dissolution, he might have maintained an action against Hoffman to recover but for the fact that the contract upon which such a claim is based is illegal and void.

The Circuit Court, upon the final hearing of this cause, recognized the partnership between Hoffman and McMullen as continuing, and based that conclusion upon one single fact. During the progress of the work Hoffman regularly charged against the contract one thousand dollars a month for his services as manager. This circumstance the judge of the Circuit Court construed into a recognition of the partnership, and in delivering the opinion the court says (R. 101): "There was such an entire failure on McMullen's part to fulfill his obligation in the contract that Hoffman would, in my judgment, have been justified in treating it as abandoned by McMullen, and this was threatened. It is only from the fact that Hoffman continued to recognize McMullen's relation in the business by regularly charging for his own services that I am justified in treating the partnership relation as having continued. The entire burden is upon Hoffman, and it involves not only the conduct of the business of constructing the work, but all the money responsibility that attached to it, and this goes to increase the amount to which Hoffman is in good conscience entitled for his services, on which account he is entitled to be paid at the rate charged." It is apparent that the learned judge entirely misapprehended the foundation upon which this charge of $1,000 a month for the services of Hoffman as manager was based. It had no relation whatever to the partnership as such. It related to, and formed a part of, the expenses of the contract, and, as any business man would have done, it was charged against the contract, and not against the

partnership. It was a charge necessary to be made for the purpose of showing the profit, because the hire and salary of a manager is as much a legitimate charge, not against the profits, but against the receipts, as an expense of performance, as is the hire of a man who handles a pick or a shovel. Exactly the same charge would have been made, in exactly the same way, if Mr. Hoffman had been alone concerned in the execution of that contract from the beginning. That circumstance alone induced the judge at the Circuit to hold that the partnership had not been dissolved, though in his opinion Hoffman had ample grounds for its dissolution. I am impressed that if this cause should proceed in this court to a point where that question must be considered it will correct the error into which the Circuit Court manifestly fell, and will hold that Hoffman, as a matter of fact, dissolved this partnership, and if McMullen can recover anything it will be limited to the value of his interest in the contract with the city at the time of the dissolution, and any profit that may have then accrued. What these were could only be ascertained by a further accounting, because nothing in the record shows.

McMULLEN'S APPEAL.

The first assignment of error presented in plaintiff's brief, under this head, is that the allowance made by the court of $20,000 for the services of Hoffman as manager of the work done under the contract is too much. It hardly seems necessary to take any time to notice the points made in this appeal. The conclusions reached by the court are based upon findings of fact which I do not understand this court will undertake to review, especially upon such questions as are suggested by this appeal. The testimony as to the value of the services of Hoffman is quoted at considerable length in counsel's brief, and I only desire to say that the witnesses called were known to the judge

of the court, and he was best prepared of anybody to judge of their credibility. The concluding paragraph of the opinion upon the final hearing of the cause (R. p. 102) furnishes ample reason for the conclusion at which he arrived upon that point. He says: "The entire burden was upon Hoffman, and it involved not only the conduct of the business of constructing the work, but all the money responsibility that attached to it, and this goes to increase the amount to which Hoffman is in good conscience entitled for his services, on which account he is entitled to be paid at the rate charged. It seems to me that this objection comes with an ill grace from McMullen. Hoffman's entire time was devoted to this business, while McMullen had at his own disposal all his time to carry on any business in which he felt inclined to engage. This is especially true when it appears, as it does here, that by Hoffman's skillful management he added in the way of profits from a store and eating-house which he established for the purpose of more successfully carrying on the work, an amount almost if not quite equal to the entire sum charged by him for managing the business, and, besides this, carried the business when McMullen had not risked a dollar in the enterprise. Authorities are cited for the purpose of showing that compensation is not ordinarily allowed to the members of a partnership in the conduct of their business, without an agreement to that effect. Whatever the rule may be, it has no application to this case, for the plaintiff himself prays that the court shall allow compensation as he thinks according to equity. Counsel says that this prayer was inserted into the bill upon the hypothesis that McMullen would be allowed compensation for his services as well as Hoffman. Whatever his intention might have been, he could not recover anything for two reasons. The first is that he did not make proof of any right to compensation, and in the next place he submitted to the court the ques-

tion of what compensation he should receive, and the court has not found that he is entitled to anything.

Another claim of the plaintiff in his appeal is that McMullen was entitled to interest on certain money received by Hoffman. That is a question which was submitted to the Circuit Court, was fully considered by it, and it found that upon the facts of the case and in equity and good conscience McMullen was not entitled to interest. It must have found that he was quite well paid for all that he had done when in the final decree the court ordered that there be paid to him $50,000 in the procuring of which he had scarcely risked a dollar or performed any valuable service. That, under the circumstances, Hoffman ought not to be charged with interest, although under different circumstances it might have been properly chargeable. But the true rule is as laid down in Sweeney v. Neely, 29 N. J. Eq. 421: "Interest can never be allowed on an unsettled or an unliquidated account without an agreement, express or clearly implied, and the case must be a very strong one when it is between partners to warrant its allowance without express agreement to that effect. We have been unable to find any understanding or agreement, either express or implied, by which either party was to be allowed interest for moneys owing to the firm from either or from the firm to either, or from one to the other, in the conduct and management of the co-partnership business before dissolution and final settlement; and in that case until that time neither is chargeable with interest on money he owes to the other or to the firm arising out of the business transactions of the company. Cooley on Partnership, secs. 337, 338; Parsons on Partnership, 3rd Ed., 229, note f.; Lindley Partnership, 786 and note; Dexter v. Arnold, 3 Mason, 284, 289; Gilman v. Vaughan, 44 Wis. 646; Day v. Lockwood, 24 Conn. 185."

Thompson v. Noble, 65 N. W. 563 (Mich.).

Matter of James, 146 N. Y. 78.

Ashbrook v. Ashbrook, 28 S. W. 660 (Ky.).

17 A. & E. Ency. Law, 1229.

These authorities are applicable to this case.

The next point made by plaintiff in his appeal is that McMullen should have been allowed costs. It is a sufficient answer to this claim that costs in such cases are within the discretion of the court. The finding of the court that the defenses were not well taken was not based upon the theory that they were frivolous, and were not made in good faith. The defense that the partnership had been dissolved was only denied upon what we think was a misapprehension of the court of the design and effect of the charge against the contract.

CONCLUSION.

It seems to me that there is no room to doubt that the conduct of McMullen and Hoffman, in securing the contract with the city, rendered that contract void as against public policy. If, after discovering the fraud, the city had refused to pay and McMullen and Hoffman had sued to enforce payment, they would have failed if the city had plead the illegality of the contract. Relief would not have been denied because the defense was made by the city, but because the contract is void and cannot have the aid of a court, by whomsoever presented. McMullen brings that contract into this court, and, basing his claim against Hoffman upon it, prays a decree that the court, by its receiver, complete it, earn whatever profits there may be, and then divide those profits between the very parties by whose unlawful conduct the contract was acquired. Not a dollar of profits had been actually earned when the pipe line was turned over to the city to be tested on the 1st of January, 1895, nor when this suit was begun in April of that year. No profits were assured until after the test had been completed. Breaks might have occurred, which would have absorbed all the profits supposed to have been earned, and

left Hoffman liable on his bond of $140,000 for any loss in excess of the contract price, while McMullen not having signed the bond had no liability. There was no break, but the point illustrates how completely McMullen relied upon the contract with the city for the profits he seeks to recover, and shows that it is that illegal contract upon which he relies to aid his recovery. Realizing this to be the condition, he seeks by his bill, to have the court by its receiver perform what remains to be done to earn the profits, and asks the court to ascertain the amount and divide it between himself and Hoffman The Circuit Court of Appeals held that McMullen relied upon this contract. That it was illegal and that the court would not enforce it. It cannot be that in this there was error.

The Circuit Court of Appeals also held that McMullen could no more have the aid of the court to enforce this contract because he brought it in as a member of a partnership organized to perform it, than if it were presented by him independently of any partnership agreement. That the formation of the partnership between McMullen and Hoffman did not change the character of the contract with the city, and render it valid, especially when it appears that the alleged partnership was entered into by the very same parties whose illegal conduct in procuring that contract rendered it void. The Circuit Court of Appeals held that by the mere "stroke of the pen" the parties could not avoid the legal consequence of their misconduct. There can be no error in this. The conclusions reached by that court are fully supported by the facts in the record, and the law applied to them has been established by the uninterrupted current of decisions from the very beginning of our system of jurisprudence. The Circuit Court of Appeals recognizing the rule as laid down in Brooks v. Martin as correct and regarded that case as well decided, but distinguished it from the case made by the facts in

this, and held that it did not apply here. That court refused to adopt the contention of counsel for the plaintiff that the alleged partnership agreement between McMullen and Hoffman to perform the work required to complete the contract with the city "wiped out" all the illegal effects of their own conduct by which that contract was procured. They held in effect what so forcibly expressed by Mr. Justice Baldwin in Bartel v. Coleman, 4 Pet., 1889, when he says: "To state such a case is to decide it. Public morals, public justice and the well-established principles of all public tribunals alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which begun with the corruption of a public officer, and progressed in the practice of known and willful deception in its execution, can never be consummated or sanctioned by any court.

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a ***particeps criminis***, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burdens which may have resulted from the violation of every principle of morals and of law."

The Circuit Court of Appeals reached a correct conclusion as to the facts in the case, and correctly applied the law to them, there can therefore be no reason why the decree of that court should be reversed. A reversal of that decree, based upon the facts shown in this case, would be most mischievous in its effects. If based upon the contention of counsel for the plaintiff, that the alleged new partnership agreement between McMullen and Hoffman "wiped out," made a "dead letter" the frauds the same parties had practiced to secure the contract with the city, and so bring the case within Brooks v. Martin,

the effect would be to render nugatory the unquestionable law, as it now stands and has so long stood (that illegal contracts cannot have the aid of the courts to enforce them) by opening a way through which the very rascals whose acts the law condemns, could have the aid of the court to reap the reward of their misconduct, by the trick of forming a co-partnership. If this decree is reversed there would not seem to remain any reason why any bidders, under any circumstances, may not, with impunity, buy off all competitors or practice any sort of frauds, and thereby procure a contract, and then form a co-partnership for its execution and have the same protection from the courts as is given to the worthy and deserving. The opinion of the Circuit Court of Appeals discloses how completely the real points in this case were discerned by that tribunal, and the masterly manner in which answers are made to every material contention of the plaintiff's counsel, and the reasons stated upon which its own decision rests are sufficient to warrant the affirmance of its decree, and notwithstanding the fact that this court, upon what, I take it, could only have been a casual examination of the case, felt constrained to cause the record to be brought here for review, it is impossible to feel otherwise than that, upon a full presentation of the whole case, and a careful, painstaking and deliberate axamination of it, the conclusion must be reached that the Circuit Court of Appeals committed no error and its decree will be affirmed.

Respectfully submitted,

RUFUS MALLORY,
Attorney for Respondent.
DOLPH, MALLORY, SIMON & GEARIN,
Counsel for Respondent.

this, and held that it did not apply here. That court refused to adopt the contention of counsel for the plaintiff that the alleged partnership agreement between McMullen and Hoffman to perform the work required to complete the contract with the city "wiped out" all the illegal effects of their own conduct by which that contract was procured. They held in effect what so forcibly expressed by Mr. Justice Baldwin in Bartel v. Coleman, 4 Pet., 1889, when he says: "To state such a case is to decide it. Public morals, public justice and the well-established principles of all public tribunals alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which begun with the corruption of a public officer, and progressed in the practice of known and willful deception in its execution, can never be consummated or sanctioned by any court.

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a ***particeps criminis***, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burdens which may have resulted from the violation of every principle of morals and of law."

The Circuit Court of Appeals reached a correct conclusion as to the facts in the case, and correctly applied the law to them, there can therefore be no reason why the decree of that court should be reversed. A reversal of that decree, based upon the facts shown in this case, would be most mischievous in its effects. If based upon the contention of counsel for the plaintiff, that the alleged new partnership agreement between McMullen and Hoffman "wiped out," made a "dead letter" the frauds the same parties had practiced to secure the contract with the city, and so bring the case within Brooks v. Martin,

the effect would be to render nugatory the unquestionable law, as it now stands and has so long stood (that illegal contracts cannot have the aid of the courts to enforce them) by opening a way through which the very rascals whose acts the law condemns, could have the aid of the court to reap the reward of their misconduct, by the trick of forming a co-partnership. If this decree is reversed there would not seem to remain any reason why any bidders, under any circumstances, may not, with impunity, buy off all competitors or practice any sort of frauds, and thereby procure a contract, and then form a co-partnership for its execution and have the same protection from the courts as is given to the worthy and deserving. The opinion of the Circuit Court of Appeals discloses how completely the real points in this case were discerned by that tribunal, and the masterly manner in which answers are made to every material contention of the plaintiff's counsel, and the reasons stated upon which its own decision rests are sufficient to warrant the affirmance of its decree, and notwithstanding the fact that this court, upon what, I take it, could only have been a casual examination of the case, felt constrained to cause the record to be brought here for review, it is impossible to feel otherwise than that, upon a full presentation of the whole case, and a careful, painstaking and deliberate examination of it, the conclusion must be reached that the Circuit Court of Appeals committed no error and its decree will be affirmed.

Respectfully submitted,

RUFUS MALLORY,
Attorney for Respondent.
DOLPH, MALLORY, SIMON & GEARIN,
Counsel for Respondent.